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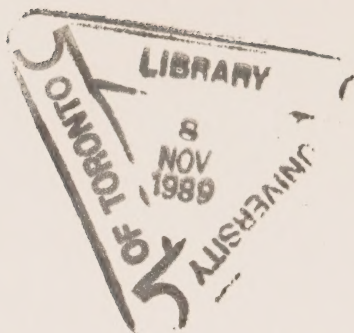
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Summaries of  
Decisions  
Volume 14  
(1985)

# Commercial Registration Appeal Tribunal



Ontario



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# COMMERCIAL REGISTRATION APPEAL TRIBUNAL

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to September 12, 1985

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Registrar: Audrey Verge

1 St Clair Avenue West  
10th Floor  
Toronto, Ontario  
M4V 1K6

(416) 965-7798

Summaries of Decisions

Volume 14 (1985)



COMMERCIAL REGISTRATION APPEAL TRIBUNAL  
SUMMARIES OF DECISIONS \* - VOLUME 14  
CITED 1985 14 C.R.A.T.

\* This volume contains summaries of, and in some instances full decisions and reasons given. If reference to the exact decision is desired, application should be made to the Registrar.

Published pursuant to the Ministry of Consumer and Commercial Relations Act, Revised Statutes of Ontario, 1980, Chapter 274, as amended.



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JAMES EDWARD ACKER

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR UNDER THE COLLECTION AGENCIES ACT  
TO REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
HELEN J. MORNINGSTAR, MEMBER  
DONALD KENNEDY, MEMBER

COUNSEL: STEPHEN O'BRIEN, representing the Appellant  
A.N. MAJAINA, representing the Respondent

DATES OF	17, 18, 19 October 1984	
HEARING:	21, 22, 23, 24, 25 January 1985	Hamilton
	28, 29, 30, 31 January, 5, 7 February 1985	Toronto

#### REASONS FOR DECISION AND ORDER

James Edward Acker, born in Annapolis County, Nova Scotia some 53 years ago, is a bailiff residing in Wentworth County where he has lived most of his adult life. In the opinion of the Tribunal, he has indulged in some questionable activities which have caused the Registrar (as well as the latter's staff) who is responsible for the regulation and administration of that industry a great deal of trouble and concern particularly the legal and investigative sections thereof who have been put to a great deal of work as the result of Mr. Acker's actions. There is, however, no doubt that he, too, has experienced great suffering and expense as the result of these, all of which may prove to have been an experience in learning for him as well as for those who may come to learn of this case. We may add that he seems to have certain enemies who impress us as being quite exceptionable characters.

Section 1(a) of the Bailiffs Act defines a bailiff as follows:

- (a) "Bailiff" means a person who acts, assists any person to act or holds himself out as being available to act for or on behalf of any other person in the repossession or seizure of chattels or in any eviction;



Section 9 of the Act reads:

Subject to section 10, the Registrar may revoke an appointment where the bailiff,

- (a) has not complied with this act or the regulations or the Costs of Distress Act; or
- (b) is, in the opinion of the Registrar, incompetent or without capacity to act responsibly as a bailiff.

Section 10 deals with the formalities of the Registrar's Notice of Proposal to revoke, as well as the right of a bailiff to a hearing before the Tribunal, and the powers of the Tribunal at such hearing, and so on.

It is interesting to note that the criteria for revocation set forth in Section 9 do not correspond precisely with the equivalent sections of the statutes governing other similarly regulated industries; this may in part be due to the fact that bailiffs are appointed by Order-in-Council of His Honour the Lieutenant Governor rather than registered in the manner of the other regulated industries; or there may be some other reason or it may be a mere coincidence.

Most, if not all the other statutes which govern the other similarly regulated industries, employ language such as this:

An applicant is entitled to registration or renewal of registration except where,

- .....
- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty...

The Tribunal's decision in this case must hinge upon the interpretation we place upon the critical words "in the opinion of the Registrar, incompetent or without capacity to act responsibly as a bailiff". And we regret, that in addressing ourselves to this task, we lack the guidance which might have been found in any previous decision upon the point either of this Tribunal or of the courts or of any submissions in argument from learned counsel for the respondent Registrar.

This means that we have been obliged to light our own way, so to speak, and in so doing we think it proper to explain how we have done this.

Firstly, as this is clearly an appeal from the Registrar's Proposal or from his decision explicit in the Proposal, the Tribunal has deemed itself competent to "substitute its opinion for that of the Registrar" - words omitted from section 9 but specifically included in the sister statutes which govern the similarly regulated industries. For unless the Tribunal has the ability to substitute its opinion for that of the Registrar then there could scarcely be any point or purpose in an appeal to it from the Registrar's decision. The Tribunal's opinion, upon which this decision is based, is that it does have authority to do so.

Secondly, what is meant by the words "incompetent" (to act as bailiff) or "without capacity to act responsibly" (emphasis added) "as a bailiff" are, in our opinion sufficiently elastic or indefinite as to require a statement as to what we take them to mean before we proceed further.

What is clear is that these words "incompetent" and "without capacity to act responsibly as a bailiff" are all the Registrar and the Tribunal have to go on with if we wish to get someone out of this industry upon good and sufficient reason (apart from the narrow scope of section (a) of Section 9). It seems also clear that the main reason the Commercial Registration Appeal Tribunal would want to revoke a bailiff's appointment would be that the Tribunal was satisfied that the bailiff was unfit to have it; "unfit", based on past events and present circumstances and largely with a view to the likelihood or probability of future happenings. One can say "incompetent and without capacity to act responsibly as a bailiff" means "unfit", and, in other words, "not a suitable person to be a bailiff".

Furthermore, to even better determine what the Legislature is driving at with this language, we should no doubt contemplate what are the criteria or essential prerequisites for a person who is fit to be a bailiff, viz. one who is competent and does have capacity to act responsibly in the performance of such an appointment. Surely these are twofold, both tangible and intangible, that is to say a good bailiff must have physical capacity to do a job including strength, health, vigour, and whatever plant and equipment he or she may need, plus common sense and a working knowledge of the Act and the conventions and methodology of the industry,

including the Registrar's rules and policies, if any, all of which could be called professional expertise. And certainly also, a good bailiff must have good character and sound judgment including integrity, honesty, fidelity to his client or principal, the ability to resist any temptation to convert to his own use or purposes in any way whatsoever any property he seizes or sequesters in the course of his work. It has been said by one Hamilton-area Provincial Court Judge who had occasion to review the facts of this case that a bailiff is a kind of quasi-judicial person and while we would in some ways prefer the term "quasi-constable type" we think what was meant is that a good bailiff should be possessed of the same qualities, in appropriate measure, as we deem the prerequisites of any public functionary whose duties include the enforcement of the law. Above all, he or she must be honest and free from all or any taint of corruption. And if ever sullied with the stain or taint of corruption that must be publicly washed away, if that is possible, no matter how painful the process, or else, if adjudged permanently and incurably unfit, such bailiff must have his appointment withdrawn.

All in all, we think the language of the sister statutes is easier to work with but the foregoing reflects, in essence, the Tribunal's understanding and appreciation of the meaning of Section 9 of the Bailiff's Act against which it has assessed the evidence in this case and reached its decision.

Having stated the foregoing by way of preliminary explanation to our reasoning we turn to the Registrar's Notice of Proposal, which is dated February 7th, 1983, together with the lengthy addendum or postscript to it entitled "Registrar's Notice of Further Particulars and Allegations and Registrar's Notice Pursuant to the Statutory Powers Procedure Act" which is dated October 3rd, 1984 and entered as Exhibit 9. These two documents are meant to spell out the essence of the Registrar's case against this appointee. The Notice of Proposal reads as follows:

#### A. NOTICE OF PROPOSAL TO REVOKE APPOINTMENT

WHEREAS James Edward Acker ("Acker") holds an appointment pursuant to the Bailiffs Act R.S.O. 1980, Chapter 37 (the "Act") to act as a bailiff in and for the Judicial District of Hamilton-Wentworth;

AND WHEREAS Section 9 of the Act provides that subject to Section 10, the Registrar may revoke an appointment for the reasons set out in the said section;

AND WHEREAS Section 10(1) of the Act provides that where the Registrar proposes to revoke an appointment, he shall serve notice of his Proposal together with written reasons therefore on the bailiff;

AND WHEREAS in the Registrar's opinion, Acker is incompetent or without capacity to act responsibly as a bailiff and therefore proposes to revoke his appointment;

NOW THEREFORE TAKE NOTICE PURSUANT TO SECTION 10 OF THE ACT THAT THE REGISTRAR HEREBY PROPOSES TO REVOKE ACKER'S APPOINTMENT AS A BAILIFF.

B. REASONS FOR PROPOSING TO REVOKE APPOINTMENT

The Registrar is of the opinion that Acker is incompetent or without capacity to act responsibly as a bailiff for the following reasons:

1. It is alleged that during the period of May 1980 to January 1982, Acker acted fraudulently or without honesty and integrity in the sale of certain motor vehicles which had been repossessed by him on behalf of clients of this bailiff's business. The motor vehicles in question are as follows:

a)	1979 Buick Park Ave.	OVM 804
b)	1979 Chev Camaro	OMN 587
c)	1976 Pontiac Aster	JZU 458
d)	1977 Aspen	LND 642
e)	1975 Ford Elite	KND 941
f)	1973 Plymouth Satellite	NFX 212
g)	1977 Ford	AZZ 185
h)	1977 Buick Century	MXP 968
i)	1975 Fiat	KEW 009
j)	1977 Monte Carlo	NPE 680

2. It is alleged further that during the period of May 1980 to January 1982 Acker carried on business as a motor vehicle dealer without being registered as required by Section 3(1)(a) of the Motor Vehicle Dealers Act R.S.O. 1980, Chapter 299.

3. It is alleged further that during the period of January 1979 to January 1982, Acker failed to keep and maintain books of account as prescribed by Section 13(3) of the Bailiffs Act R.S.O. 1980, Chapter 37.

C. RIGHT TO HEARING [Particulars of appeal procedure - omitted]

The Notice of Further Particulars, etc., being Exhibit 9, runs to some 13 pages which we have attempted to somewhat condense. After reciting the issuance of the above Notice of Proposal it continues:

4. Prosecution proceedings were commenced, respectively, under the Motor Vehicle Dealers Act...and the regulations made thereunder and under the Bailiffs Act.

[These were not criminal prosecution proceedings; they took place in the Provincial Offences court before a Justice of the Peace.]

The charge or information in respect to these proceedings is reproduced hereunder:

- (1) James Edward Acker and Robert A. Steiner...during the period between May 15, 1980 and January 30, 1982, at the City of Hamilton, in the Judicial District of Hamilton-Wentworth and elsewhere in the Province of Ontario, unlawfully did carry on business as a motor vehicle dealer when they were not registered under the Motor Vehicle Dealers Act, R.S.O. 1980, Chapter 299, contrary to section 3(1)(a) of the said Act and thereby committed an offence under section 22(1) of the Act.
- (2) James Edward Acker...between January 1, 1979 and January 15, 1982, at the City of Hamilton in the Judicial District of Hamilton-Wentworth and elsewhere in the Province of Ontario, unlawfully did, being a bailiff, fail to keep and maintain books of account in accordance with the accepted principles of double

entry bookkeeping, contrary to section 13(3) of the Bailiff's Act, R.S.O. 1980, Chapter 57 and thereby committed an offence under section 18(1) of the said Act.

5. The trial, before His Worship, D. Patterson, of the Provincial Offences court, in respect of Acker concerning the said two charges, lasted approximately 14 1/2 days. On conclusion of the trial, the learned Worship found Acker guilty on each of the said two charges and sentenced him to pay the maximum monetary fine of \$2,000.00 under the said Motor Vehicle Dealers Act and a fine of \$500.00 under the said Bailiffs Act, notwithstanding the absence of any previous conviction. Acker was further ordered to pay \$2,000.00 within a period of six months and to pay \$500.00 within a period of ninety days.

Steiner, however, pleaded guilty and was fined \$500.00.

6. The Registrar is informed, and he believes and alleges that Acker's appeal from the conviction of the charge under the Bailiffs Act was dismissed and that Acker is seeking leave to appeal further from such dismissal.

The Registrar is further informed, and he believes and alleges, that Acker's appeal from the conviction of the charge under the Motor Vehicle Dealers Act is pending.

[The status of the matters referred in the above paragraph 6 remains unchanged as of the date of these Reasons].

7. In addition to the Notice of Proposal under the Bailiffs Act and prosecution proceedings, all as aforesaid, the Registrar of Motor Vehicle Dealers and Salesmen issued a Notice of Proposal on September 7, 1983. The Registrar thereby proposed to refuse to grant registration as a motor vehicle dealer to 544352 Ontario Limited, to carry on business as Centre Automotive Sales and Services, of which



Acker is the president and a director, and he also thereby proposed to refuse to grant registration to Acker to act as its salesman, all pursuant to the provisions of the said Motor Vehicle Dealers Act.

A hearing had been applied for by the said motor vehicle dealer and its salesman, Acker. The proceedings in connection with this matter, which is identical or similar in regard to the alleged issues or facts, to the said proceedings under the Bailiffs Act and prosecutions, are also pending.

TAKE FURTHER NOTICE THAT:

8. The Registrar incorporates the entire Notice of Proposal issued on February 7, 1983 under the Act, as if it is fully and expressly set out herein, and further alleged particulars supplemental thereto include the following:

FURTHER ALLEGED PARTICULARS

(1) Acker was appointed as a bailiff, effective September 15, 1977. He was informed accordingly by the Registrar's letter of September 17, 1977 which stated, in part, that "Attached is a letter of instructions to which you are asked to pay particular attention."

The said "letter of instructions", in part, states the following:

"....You are required to devote your full time to bailiff work and not be engaged in any other line of endeavour whatsoever except as authorized.

"As a private bailiff you are neither a Peace Officer nor a Court official. Your powers are limited to acting as an agent for the creditor in the repossession of goods and chattels..."



The Registrar believes and alleges that Acker acted contrary to these instructions.

(2) Section 1(a) of the Act defines the bailiff as follows:

"Bailiff" means a person who acts, assists any person to act or holds himself out as being available to act for or on behalf of any other person in the repossession or seizure of chattels or in any eviction.

The Registrar has been informed and, on such information, he believes and alleges that Acker did not restrict his activities merely to "the repossession or seizure of chattels or in any eviction", as provided in the said definition of a bailiff.

In this connection, the Registrar adopts and reproduces hereunder the registration status of Acker and Steiner and their activities, which are synopsized by one of the Ministry investigators.

[Here follows the following Synopsis of the registration status of Acker and Steiner including a "Synopsis of their activities". In the opinion of the Tribunal, the particulars set forth of the various registrations are essentially accurate but the particulars or allegations concerning their alleged activities will be subject to certain qualifying comment by the Tribunal, based on the evidence at the hearing, as these Reasons continue.]

#### SYNOPSIS

James Edward Acker was duly registered as a Motor Vehicle Dealer during the period 16th of June 1965 to 4th of April, 1977, and has not been so registered since that date.

He was appointed a Bailiff in and for the Judicial District of Hamilton-Wentworth, effective September 15, 1977. As a Bailiff he was required by his clients who were

local lending institutions, banks, trust companies and credit unions, to repossess various items, but most repossessions were motor vehicles where the borrowers had not repaid as agreed.

In addition to his duties as a Bailiff, Acker also arranged for the storage of repossessions for the period of time required by law, and then obtained bids for the sale of these units from interested parties including local used car dealers. Unknown to the lenders he had made arrangements with at least two such used car dealers, Algonquin Mobiles and Hamilton Car Care Centre, operated by Adolph Lucchi, allowing him to buy and sell cars for his own benefit using their names, and putting the cars through their books in return for a fee Acker paid to them for this accommodation.

Acker holds the mortgage on the premises of one of these dealers, Adolph Lucchi.

The lender required a minimum of three bids on each repossession, and Acker did provide at least that number, but investigation has revealed that they were not sealed bids, and that he obtained them from friends or other people who were prepared to accommodate him for one reason or another.

The payment for these units purchased in the names of other dealers was made by Acker to the dealer at the same time as the dealers paid the lenders for the cars, so that the dealers did not have to tie up their own capital.

It should also be noted that he did buy some cars in his own name using a straight forward purchase procedure.

The repair work required on the cars, plus the safety standards certificates required to be issued, were all done by one or two repair garages known to Acker, primarily by

379365 Ontario Limited, operating as Centre Automotive Sales and Service, another firm where Acker holds a mortgage on the business premises. These people also provided bids on cars, but never actually bought any cars.

Cars were usually resold shortly after purchase, often at a wholesale level to other dealers, and virtually always at a good profit. Others were retailed to friends and customers who knew him to deal in cars.

This investigation has also revealed James Acker did not prior to February of 1982, maintain any ledgers or books relating to his operation as a Bailiff.

Robert A. Steiner was duly registered as a Motor Vehicle Salesman under the Motor Vehicle Dealers Act during the period March 10, 1967 to November 5, 1976, approximately, and during the period January 2, 1979 to March 3, 1980, but has not been so registered since that date. Some time in 1980 commencing at least in May of 1980, and continuing until April of 1982, he worked with James Acker repossessing, purchasing, and selling vehicles. He was not at that time registered as either a Motor Vehicle Salesman, or as a Bailiff.

(2) The Registrar also adopts and reproduces hereunder a chart or a spread-sheet, which had been prepared by the said Ministry Investigator and which gives further particulars of the motor vehicles mentioned and referred to in the said synopsis:

[Here follow three pages of a chart or spread-sheet prepared by the Ministry's Senior Investigator which gives further particulars as alleged by the Registrar in relation to 22 vehicle transactions including the ten mentioned in the Notice of Proposal. Included are the licence and serial numbers, make and model of each vehicle, as well as the

identity of the original owner (the debtor from whom the seizure was made) and that of the lender or the lending institution on whose behalf the vehicle was seized. Also shown is the amount of the successful bid in each case, the source of the safety certificate, the name of the ultimate buyer and in at least half the cases, an allegation as to the identity of a person described as a "salesman" in such transaction, as well as some estimate of an amount of "profit" resulting therefrom.

[This chart is based on the research of the Registrar's Senior Investigator and the information is by way of allegation (much of which was not disputed) and in only 14 of the 22 cases is there any amount shown by way of alleged profit. These sums were disputed. It was admitted in the course of testimony that they were alleged to be "gross profit" only and subject to reduction or elimination by various marketing expenses such as the cost of repairs, safety standards, new tires, etc. The "gross profits" attributed in whole or in part to Acker were alleged to have totalled some \$7,690.00 or 8,090.00 over a period of between 24-25 months between December 1979 and January 1982.]

The Registrar's Notice (Ex.9) continues as follows:

#### REGISTRAR'S FURTHER ALLEGATIONS

(1) Acker did act contrary to the terms or conditions of his appointment as a bailiff, as stated in the Registrar's said letter of September 16, 1977, for the reason that (1) he did not devote his full time to bailiff work, (2) that he did engage in other lines of endeavour such as, the purchase or sale of motor vehicles, and (3) that he exceeded his powers which were limited to acting as an agent for the creditor in the repossession of goods and chattels; or

(2) Acker did act contrary to the Act, for the reason that he did not restrict his activities as a bailiff merely to "repossession or seizure of chattels":, as provided in the said section 2(a) of the Act; or

(3) In the Registrar's opinion, Acker had carried on his business as a bailiff in an incompetent and irresponsible manner,

within the meaning and contemplation of section 9(b) of the Act, for the reason that it was his duty, as an appointed belief [sic], to be thoroughly aware of the provisions of the Act and be seen to be acting in accordance therewith; or

(4) Acker did engage himself in a series of questionable transactions subsequent to the repossession or seizure of motor vehicles as exemplified by the said synopsis and the said charter or spread-sheet; or

(5) The Registrar considers that Acker did act in an incompetent or an irresponsible manner, for the reason that he did act in excess [sic] of his authority as a bailiff, all as aforesaid, or for the further reason that he did not keep and maintain books of account in accordance with accepted principles of double-entry bookkeeping, as it was his duty under section 13(3) of the Act; or

(6) The Registrar considers that Acker, as an agent, failed or neglected to carry out one of the most basic duties, namely, to act in the best interest of his principals, primarily by making the fullest and true disclosure of all material facts; or

(7) Acker had been a registered motor vehicle dealer under the said Motor Vehicle Dealers Act for a number of years and he discontinued being a partner of Cut-Rate Motors on or before his appointment as a bailiff. He, however, continued operating as an unregistered motor vehicle dealer, all as aforesaid, and in so doing he used methods or he did engage himself in a course of conduct which are or is considered reprehensible or irresponsible.

Investigation disclosed further that Acker had a vested interest, either directly or indirectly, in the registered

motor vehicle dealer's business of 379354 Ontario Limited, operating as Centre Auto Sales and Service, whose director, officer and a registered salesman was one Jurgen Emil Eisebrenner, and in the registered motor vehicle dealer's business of one Adolph Lucchi, operating as Hamilton Car Care Centre. Acker's said interest in these two registered dealerships was arranged, by Acker ostensibly loaning money to his wife, who invested it in mortgages to the said two dealerships.

Bids were placed by the said two dealerships on behalf of Acker, who was, thus, directly or indirectly, responsible for the submissions of the said bids, with the view to purchasing the motor vehicles repossessed by Acker. Acker, contrary to his fiduciary duties, did not disclose the significant factor of his vested interest in these two dealerships to his various principals.

Further, bids were submitted by another registered motor vehicle dealer, namely, 382016 Ontario Limited, operating as Algonquin Mobiles, one Ronald Oke, being one of its principals and, in this case also, Acker was responsible, directly or indirectly.

Not only did Acker fail or neglect to make total and true disclosure of all facts, including the fact of his said vested interest and of his purchase and subsequent sale of the various repossessed motor vehicles, but he made, as well, a secret profit, as exemplified by the synopsis and the said chart or spread-sheet, all contrary to fiduciary duties imposed on him by the law of agency.

The Registrar, therefore, believes and alleges that Acker set out to deceive or mislead, or that he did deceive or mislead, his various principals by misrepresentations or by non-disclosure of material facts. In



the alternative, the Registrar believes and alleges that Acker knew or he ought to have known that his various principals would be deceived or misled thereby.

(8) The Registrar, therefore, concludes that Acker did act in an incompetent manner or that he has demonstrated an absence of capacity to act responsibly, having regard to his authority and duties governing his appointment as a bailiff, within the meaning and contemplation of the said section 9(b).

The foregoing condensation of Exhibits 7 and 9 filed at this hearing provide, we trust, the gist of the Registrar's case and essential allegations of wrong-doing against the Appellant. After studying the great volume of documentary material exhibited including two transcripts of judicial decisions, and after hearing 24 witnesses during 14 days of public hearing, both in Toronto and in Hamilton, over a period of some three months, as well as many hours of review of the several hundreds of pages of notes we took and lengthy deliberations, the Tribunal has reached its own conclusion, which is a unanimous conclusion, as to what it may reasonably believe to have been the probable facts of this case. As well, it has reached conclusions concerning certain allegations it does not deem to have been sufficiently demonstrated or proven against the Appellant. The Tribunal's perception of the essential factual situation runs as follows:

James Edward Acker, born in Annapolis County, Nova Scotia, some 53 years ago, as aforesaid, came to Hamilton in 1950 when he would have been some 19 years of age. A couple of years later, when he was about 21, he took employment with The Hamilton Spectator as a compositor and he held that position, which, as he describes it, seems varied and quite interesting, for the next 23 years until 1980. Some time during that period he married, and presently has two children, a daughter who was 7 when he gave his evidence last January and a son aged 9. He lives with his family in a house which he built himself some distance out-of-town. At some point prior to his marriage he purchased a farm property located somewhere above the mountain near Hamilton which turned out to be a very good investment with the result (which is also probably due to industry and competence in business generally) that his net worth now stands at some \$800,000 so that, whatever his other faults may be, he is not lacking in a degree of financial independence.



During his latter years with The Spectator, he displayed an evident interest in the subject of used cars, to the extent that he became registered as a motor vehicle dealer as a sideline. He remained duly registered from June 16, 1965 to April 4, 1977 (as stated by the Registrar) carrying on business (with a partner) under the name and style of "Cut Rate Auto Sales". There has not been the slightest evidence set before the Tribunal, either by Mr. Abrams, the Registrar of Motor Vehicle Dealers and Salesmen, who came to Hamilton to testify before us or by anyone else that that business, which was carried on in the vicinity of the City of Hamilton for almost 12 years, was in any way dishonest or anything less than strictly up and up.

However, we can at least make the observation that a man who is the co-proprietor of a motor vehicle dealership specializing in used cars over a period of 12 years, while at the same time working full time as a compositor for a local newspaper, does thereby demonstrate a considerable and even considerably greater than average interest in the subject of used cars. It could be said that whereas many people find the whole subject of used cars extremely boring, Mr. Acker evidently did not, indeed he must have been very interested in them. Perhaps this was a carry-over from adolescence. We do not know. But at all events he was clearly during these 12 years a man who was very interested in used cars, who must have spent a lot of time thinking about them and might even have been, so far as we know, fascinated by them. (But there is no evidence that this interest, at least during the 12 years of his registered dealership, was in any way an unwholesome interest or an improper one.)

On April 4th, 1977 Mr. Acker - still deriving his principal earned income from his full-time job at the Hamilton Spectator - got out of the automobile business and gave up his registration as a motor vehicle dealer. Later, on September 17, 1977 of that same year, he was appointed a bailiff in and for the district of Hamilton-Wentworth. We can draw no sinister conclusion upon the evidence or otherwise for this change of occupation. The factors that led to his giving up his co-proprietorship in the car business and his motor vehicle dealership registration, were, so far as we see it, completely innocuous. We don't know why he decided his next move after this should be to become a bailiff - probably, so far as we can see, because he simply fancied being a bailiff. A bailiff is largely his own boss; he can work more or less his own hours because the hours are flexible, and the work carries a certain dignity. Probably it struck him as a good occupation for some

one of his age and circumstances. We might mention that Mr. Acker's background was investigated to some extent at this point and prior to his appointment and it was ascertained that he had no criminal convictions at any time against him, which remains to be the case at this time.

The method whereby a person becomes appointed a bailiff consists (or at least did in 1977) of obtaining a recommendation for appointment from the local Clerk of the Peace (who, at that time, in Hamilton, was the Crown Attorney) which recommendation is passed on to His or Her Honour the Lieutenant-Governor if the Clerk is satisfied as to the need for a bailiff or an additional bailiff and as to the applicant's fitness for appointment. The appointment extends to a specific county or district although supplementary appointments for nearby counties and districts are, in practice, often made. When Mr. Acker was appointed he received a letter (Exhibit 12) from the Registrar setting out certain guidelines which, in the Tribunal's opinion, was not as specific as it probably should have been. It stated that the appointee should apply himself full time to the occupation of bailiff and not engage in any other occupation; however it was implicit in the correspondence he had with the Registrar that he intended to remain (as he did for a couple of years) for some time with The Spectator and no particular objection had been made to that. The Registrar's instructions apparently reflected an expression of his policy, what he preferred the appointee to do or not to do, rather than the strict provisions of the statute or its regulations or any other law. The Tribunal is of the opinion that despite the fact that a person fit to be a bailiff should be a mature, sensible and responsible individual capable of conducting himself in accordance with those qualities to a high degree, it is nevertheless regrettable that the guidelines and the Act were not considerably more specific.

The work of a bailiff in a community such as Hamilton and its environs reflects the nature of the economy of that community and the life modes of its population, etc., and therefore, as things turned out, the bulk, perhaps over 80% of Acker's work involved the repossession of motor cars. He applied himself to this activity with what many of the witnesses stated and none denied was a high degree of proficiency and skill including tact and good judgment and, also, his charges were modest and he worked hard and efficiently for what he earned. His business quickly grew. It was inevitable that he brought with him to this activity the knowledge of cars, used cars, which he had acquired in his

previous business occupation as well as the pronounced personal interest in used motor vehicles upon which we have commented above. Just as some people are interested in old books, others in musical instruments or antiques, Mr. Acker had and carried with him wherever he went this pronounced interest in cars. It was this quirk or bent of his which, together with other unfortunate circumstances, got him into deep trouble.

In the opinion of the Tribunal, the proper method of operation to be followed by a bailiff when he or she seizes or repossesses a motor vehicle, i.e. when he or she executes a seizure warrant, is to take possession of that chattel in a peaceable way - and it is the performance of that act which is the bailiff's principal function - and convey it to a secure garage or parking lot known as a compound. Except in the case of voluntary surrender, where the bailiff will have been given the keys by the chattel mortgagor and can drive it there, this was usually done by means of a tow-truck. (The important role of tow trucks and their operators will be mentioned later). Once the property is in the compound the seizure is perfected and in cases where the proper procedure is being followed the bailiff's function is finished: that is to say, his involvement with the property is and should be over.

But in some jurisdictions it seems the practice differs from this. And at the time Mr. Acker was practicing, from 1977 to the time he got into trouble, the bailiff's task was extended one or two steps.

The seized property having being deposited in the compound it must remain there for any statutory period within which the owner (chattel mortgagor) is entitled to make redemption. Sometimes, where the chattel mortgagee who has ordered the seizure (the bailiff's client) is particularly sensitive to public relations or to any kind of adverse publicity, which is very much the case with large national institutions such as trust and loan companies and the chartered banks, the redemption period or period of grace will be extended most generously up to 30 days or more. What happens then is that the chattel mortgagor in possession will recover the amount owing by selling the property. This operation is also the subject of the most fastidious procedural nicety, i.e., where the national institutions are the clients, and for the same reasons, reasons of public relations, because experience has shown that repossession is often a matter of high emotional involvement and cases have been known where children of tender years, the offspring of debtor parents, have been traumatized and so charged with resentment towards the

banks or other creditors that they have carried bitterness throughout their whole ensuing lives. This is bad for business and so the rule followed by corporate lenders today is "get the money back - but be fair and above all be perceived as being nice". Consequently, only nice people are permitted to do this work and, while extremely efficient, they do it in a very nice way. Or, better still, and whenever possible, they get someone else to do it.

And so it came about, in the locality we are considering, that a practice developed where the bailiff who had seized the property - and here we are talking of repossessed motor cars - was then invited or encouraged or otherwise permitted to preside over the disposal of them; as though this were part and parcel of his function, considering which, most people, including debtors, are rather vague to start with. The advantage of this method from the standpoint of institutional creditors is fairly clear. If "preside" is somewhat excessive a description of the bailiff's extended role in the sensitive disposal operation we may say that the bailiff was permitted to play a helpful role, giving further assistance to the creditors or mortgagees in possession in what we may call their distressing task. This was to arrange for the calling, collecting and delivering to the creditor institutions of tenders for the purchase of the vehicles to be resold.

The precise methods varied from time to time and from one repossessing institution to another - we shall not delve into the minute particulars. However, the practice which became widespread was more or less that notices, giving particulars of the repossessed vehicles, would be posted by the bailiff at the compound and by means of these, interested parties - dealers or private persons (sometimes friends of the debtors who had previously owned the cars) and others - would be invited to submit bids. We understand that frequently the bailiff would convey these to the creditor institutions although they may just as possibly have been submitted directly in other cases. Seemingly the practice varied. But the point is that a basically improper practice developed where the bailiff or bailiffs were getting involved in the disposal side of the debt-recovery business to an extent which went beyond what was proper or expedient.

Whose fault this was is not clear. In the Tribunal's opinion the banks and other lending institutions involved cannot escape some criticism. Their role was apparently rather passive; if they did the wrong thing it was more by omission than commission we believe. But large banks and loan companies are meant to be presided over, we assume, by knowledgeable



people, and so if Mr. Acker went off the rails because of some imperfection(s) in the systems followed by his institutional corporate clients then we will not say he was wholly to blame. We note for the record at this point that testimony was set before us that the practices of at least one bank have now been reformed and we understand that other banks are following suit so that in future the bailiff's function will be strictly limited to repossession and conveyance to the pound after which auctioneers will be employed in respect of those matters concerning the disposal of the vehicles where Mr. Acker came to grief. Yet during the period from the commencement of his practice as a bailiff until the time of his downfall (i.e. when he was charged, brought before a Justice of the Peace for the consumer offences mentioned in the Proposal, and convicted) Mr. Acker was exposed to the temptations inherent in this wrong-headed practice then prevalent of bailiffs being involved in the disposal of the cars they had seized.

The Tribunal has heard and studied the evidence and we have set out above the essential particulars and allegations of the Registrar's case against him. These concerned some 22 cars variously dealt with over a two year period. We find that some of these dealings were wholly innocent; and that in other cases such dealings may partly or entirely have been by another person without his being responsible for them, i.e. by Robert Steiner about whom we shall have more to say below. But we are bound to conclude that in at least some of the transactions which the Registrar has called into question Mr. Acker did, in fact, contrive to influence the manner in which a repossessed vehicle was disposed of. This practice, which can be called "bid-rigging", was very wrong and we are unanimous and emphatic in our view that Mr. Acker, who had been vested with the honour of an appointment by the Lieutenant Governor in Council, disgraced himself and the bailiff's calling in so doing. Also that he should be subjected to severe and exemplary sanction.

However, there are a number of mitigating factors which fairness must take into account when we contemplate the position to which this Appellant has been reduced over 2 years after the charges were laid. At the conclusion of a 14 1/2 day trial before a Justice of a Peace in Provincial Offences court - a Court which hears charges under Consumer Protection legislation involving irregular business practices and so on but which is not a Criminal Court - he was found to have failed to keep and maintain books of account in accordance with the accepted principles of double entry bookkeeping, contrary to Section 13(3) of the Bailiffs Act thereby committing an offence under Section 18(1) of the said Act. He was also convicted of an offence under Section 22(1) of the

Motor Vehicle Dealer's Act in conjunction with Robert Steiner, namely, unlawfully having carried on business contrary to Section 3(1)(a) of the Act. He was fined a total \$2,500.00, \$2000.00 under the said Motor Vehicle Dealer's Act and \$500.00 under the Bailiffs Act. He was also faced with the costs of a 14 1/2 day trial and of a 3 day appeal from the Bailiffs Act Conviction (which was not successful but in respect of which he has currently launched a motion for leave to further appeal. He is also currently appealing his conviction under the Motor Vehicle Dealers Act.) It may be said, therefore, that he has sustained the very real punishment of tens of thousands of dollars of outlay in legal costs, not only in the courts but resulting as well from his 14 day hearing before this Tribunal; costs, we must observe, which would not have occurred had he pleaded guilty in the Provincial Offences court (as did his former employee and co-accused) or had he acquiesced in the Registrar's proposal to revoke his appointment. He also suffered the disgrace and public humiliation consequent upon these convictions and further financial loss from the loss of business he has sustained; indeed his business, which at one time yielded an income of some \$36,000 a year is now virtually in ruins. Yet he has launched these appeals and fought like a tiger to retain his appointment. In view of the evidence, which the Tribunal is inclined to accept, that his charges for the bailiff services he rendered were always extremely reasonable, and of the evidence of his general financial circumstances, we do not believe that his efforts to retain his appointment are entirely financially motivated and we think what he may be primarily endeavouring to do in the great struggle he has put up to retain his appointment is to clear his good name and reputation in the community. This we find an honourable motive, bespeaking considerable good in this man and in accordance with the evidence of the character witnesses who appeared. And we note that few if any of the witnesses who gave evidence at the hearing and who were questioned concerning his good character and competence as a bailiff had other than good to say of him. We are excepting Messrs. Steiner and Park to whom we shall be making further reference below.

The Tribunal is not convinced that such of the 22 allegedly improper motor vehicle transactions as were, in our opinion, in fact improper and the proper subject of severe and exemplary sanction as mentioned above, were, however, characterized by the full measure of evil depravity which we would be obliged to find in order to fully sustain the allegation set out in the first paragraph of the Registrar's Reasons for Proposal to Revoke Appointment at page 1 of Exhibit 7, to wit, that "during the period of May 1980 to January 1982 Acker acted fraudulently or without honesty or integrity" in

the sale of such vehicles . The word "fraud" and the whole concept it denotes are far from simple as the following definition extracted from Mozley and Whiteley's Law Dictionary, 7th Edition, suggests:

Fraud. The modes of fraud are infinite, and it has been said that the courts have never laid down what shall constitute fraud, or any general rule, beyond which they will not go in giving equitable relief on the ground of fraud. Fraud is, however, usually divided into two large classes, actual fraud and constructive fraud.

An actual fraud may be defined to be something said, done or omitted by a person with the design of perpetrating what he must have known to be a positive fraud.

Constructive frauds are acts, statements or omissions which operate as virtual frauds on individuals or which, if generally permitted, would be prejudicial to the public welfare, and yet may have been unconnected with any selfish or evil design; as, for instance, bonds and agreements entered into as a reward for using influence over another, to conduce him to make a will for the benefit of the obligor. For such contracts encourage a spirit of artifice and scheming and tend to deceive and injure others.

Our thinking in this regard dwells on two areas of consideration - motive and consequence. As we were reminded by learned counsel for the Respondent Registrar, the criminal law concept of "mens rea" or guilty intention is not a prerequisite for a finding that an appointee's conduct has demonstrated unfitness to continue in the industry. The Respondent was under no onus to prove nor the Appellant to specifically disprove dishonest intention and, indeed, the Tribunal accepts the latter's intention was not honest in respect to the bid rigging which we have determined took place. We deplore this. But at the top of page 6 of Exhibit 9, the Registrar's Notice of Further Particular's, it is alleged that "cars were usually resold shortly after purchase...and virtually always at a good profit". During the 14 days of the hearing the Respondent



failed to prove this to our satisfaction. What seemed more probable was that the profits were modest or that there weren't any. According to the spread sheets contained in Exhibit 9, the gross profit imputed in whole or in part to Acker seems to have been somewhere in the 5 to 6 thousand dollar area and this was in respect to all the transactions complained of. But the Respondent admitted that safety standard Certificates were issued and at the modest price of \$25.00 each (which is what Mr. Acker's preferred mechanic - who appears to be a most excellent mechanic - charged, in contrast to a fee of 3 or 4 times that amount usually charged in Toronto). For 22 cars he bought, the profit figure would thus be reduced. And again it was alleged that between \$75 and \$100 was paid in each case to a registered car dealer in an attempt to legitimize each transaction thus again reducing the net profits before even beginning to account for the repairs which we are convinced were in fact made and receipts were produced for most of these, as well as the new tires which Mr. Acker said he supplied in many cases before being able to resell because of the requirements of the safety standard Certificates.

Consequently we doubt that Mr. Acker made "good profits" on these transactions. Moreover we are convinced by the evidence that his motive in getting involved at all was to accommodate friends and acquaintances whom he knew in and around the areas where he lived and worked. One can peruse the list of buyers and it is possible in almost every case to readily perceive some connection between the buyer and Mr. Acker. For example, Mr. Walton who bought a car from or through Acker worked at the Ontario Government office where motor vehicle ownership transfers were registered. Mr. Acker had known him for a long time, going back to his days as a registered dealer. This gentleman, a government functionary, apparently thought Mr. Acker had access, as a bailiff, to good repossessed cars and could get him one at a good price. More importantly, he must also have thought that Acker was an honest man and that the car he bought through Acker would be a good one and worth what he would be paying for it, something one can't always be certain of with the average used car dealer whether registered or not. So Mr. Acker "arranged" or made sure that the car Mr. Walton wanted was obtained for him. To do this he practiced what must be called bid-rigging. But the winning bid, - the winning rigged bid if you will - according to the testimony of Steiner, Acker's enemy, was based on the "black book" which is an annually published compendium of used car values - sometimes called the car dealer's bible; in other words, it was based on a very reasonable assessment of value to be found in a semi-official book and not wildly out of line with true value. We note, too, the testimony of the officials

of some of the lending institutions involved in the case that they would accept the highest bid only if it was in line with the figure which they looked up in the black book, not perceptibly less than fair market value as so determined. So the basis of acceptance of the winning bid was also in accordance with fair market value as per the book. It was not automatic so as to make it likely that any car would go for an amount really substantially less than it was worth. We believe that the essence of the "rigging" of bids was that it was done not to obtain undue profit for Acker by fraud as alleged, but to ensure that a "good" car was obtained for one of Acker's acquaintances. So far as we can see, this was the pattern in each of the "rigged" transactions - the party being accommodated by Acker was someone whom he knew or who was related to someone he knew, e.g. - his furnace man; his mechanic's secretary or her sister; a lady in the Canada Permanent office credit department; a manager of a credit union and, later, the latter's father, and so on. In the Tribunal's opinion, profit was not the motive. The motive was a desire to accommodate people; perhaps, also, a desire to look important. We note also that the impugned transactions - 22 in all and not all proven - were a small proportion of the volume of vehicles which passed through Acker's hands as a bailiff. In 1982, for example, he seized 228 vehicles in all, as well as other items of chattel property. The bulk of all these repossessions are free from any imputation of wrong of any kind. In summation, we don't believe that Mr. Acker intended through what he did, as much as we disapprove of it, to improperly enrich himself. What he did, in our belief, was done through a misguided desire to help his acquaintances and quite possibly to raise his status or his importance in their eyes. The motive was perhaps faintly pathetic, but not monstrous. As indicated above, we think the main reason people were keen to deal with Acker was that they trusted him and knew that his "repos" (repossessed cars) were likely to be good cars - something not all used car dealers can always be trusted to provide.

(We might also mention that "bid rigging" in these circumstances is an entirely different kind of misconduct from what the term means in the context of, say, the construction industry - especially, for example, construction contracts or harbour dredging contracts, involving government agencies and huge sums of money and corruption on a grand scale. This difference would be like the difference between benign and malignant tumors.)

Whom did he hurt? The principal concern of this Tribunal is the protection of the consuming public and we perceive three kinds of consumers in a case such as this.

These are, first, the consumer whose debt-encumbered property is seized. Persons in this class, who are certainly never in any circumstances to be disparaged or belittled because they may have experienced financial adversity, something which can result from illness or job loss or any kind of bad luck, things to which we are all susceptible, are entitled to fair play. When their goods are repossessed they are entitled to be fully credited with any surplus (overage) over and above the amount of the debt and the proper costs of the repossession process. Also they are entitled to the assurance that their goods, if they must be sold because they are unable to redeem them after repossession, will be sold at a fair price, i.e. that fair market value obtained in an open market will be realized so that any deficiency between the sum thus realized and the amount owing (such deficiency thereby to remain owing by them to the creditor) will be the minimum possible amount fairly determined. This is in the interests of the second category of consumer in a case like this, the client who hires the bailiff because, as principal in the seizure transaction, his reputation and ultimately his liability under law are at stake. Finally, where the goods are resold, the resale buyer is of course a consumer with an interest to protect.

Of these three categories of consumers, there has been no evidence of any loss or claim for loss in connection with the first. One assumes that if Mr. Acker made a car available to, say, Mr. Walton, at "a very good price", that Walton's gain would be the original owner's loss. There has been no evidence of any loss sustained by any of the original owners however. We cannot find that this happened. This is not to "whitewash" Mr. Acker. Perhaps the institutions who hired him absorbed any such losses. Having repossessed someone's car and liquidated it, it would not be easy or very much fun to then go after that person for a \$100 deficiency nor would it enhance one's company's public image. Or perhaps the lending institutions never accepted any bid that would have left a large deficiency or resulted in a substantial shortfall. The institutions used the "black book" and so did Mr. Acker. We suspect that if the debtors sustained any losses they related to some minor amounts of "overage" which would otherwise have been refunded to them. But such losses are only hypothetical in this case. There is no scrap of evidence to prove a single one.

Similarly, there is no evidence that the lending institutions who were Mr. Acker's clients sustained any financial losses, at least due to Acker. They didn't have to. They may have lost or felt that they lost something by way of their public standing when Mr. Acker got into trouble and fell from grace.

Finally, who among Mr. Acker's purchasers were hurt or cheated or felt they had been given less than full or fair value for their money? Most were satisfied. Several, a minority of the purchasers of the used vehicles, were disappointed with the way these vehicles held up or performed over the ensuing years or months after their acquisition of them, but none attempted to blame Mr. Acker with one exception, Mr. and Mrs. Head.

Mrs. Head worked for The Permanent, in that Department which would be in contact with the bailiff. Apparently the Heads learned that Acker could get them a good repossessed used car as he had done for others and were keen to make use of this opportunity. Mrs. Head later said Acker misrepresented the odometer reading, stating the mileage was much lower than it was. Acker says the odometer was broken and that he informed her of this. In point of fact she signed her name to a Bill of Sale on which the true or higher mileage (in kilometres) was shown and that document was set before us in evidence. What further proof could be required that she knew perfectly well what the true figure was? And yet, later on, when the "cam shaft" came to be broken, the Heads went to General Motors and persuaded that Company to replace the same upon a special arrangement whereby G.M. supplied the parts free and the Heads paid only for the labour of installing them - this exceptional concession was made by G.M. on the basis of the representation made to them by the Heads that the mileage was low. Therefore, for the Heads to have admitted that they had known from the moment Mrs. Head signed the Bill of Sale showing the true mileage which was different from that shown on the broken instrument, would have been tantamount to an admission that they had knowingly defrauded G.M. of the value of the parts the Company supplied on the erroneous assumption that the lower mileage referred to was accurate. The Tribunal is of the opinion that the testimony of Mrs. Head that she was cheated by Acker in respect of this point is unreliable in that she and her husband had taken advantage of the inaccurate odometer reading and had a substantial motive in sticking to the story that Acker had made misrepresentation to them in order to avoid any possible claim against them for having obtained goods, to wit, automotive parts, through fraud and misrepresentation from G.M. Also, based on the testimony we heard from the latter, we believe that the person who put the idea into Mrs. Head's head that she had been cheated by Mr. Acker was Robert Steiner.

Which brings us to an extremely distasteful aspect of this case which cannot go without comment.



Acker's co-accused in the charge under the Motor Vehicle Dealer's Act at the Provincial Offences court was a man called Robert Steiner, who pleaded guilty to the charges which we think somewhat compromised Mr. Acker's defence. He was fined \$1,000.00 on two counts upon a Motor Vehicle Dealer's Act conviction and Acker \$2,000.00 because the Justice of the Peace said if the employee was fined the employer should be fined more.

It seems that in 1980, shortly before leaving The Hamilton Spectator, Mr. Acker, who is a middle aged man of medium build, injured his knee against a heavy desk with the result that he had to be hospitalized and underwent one or more operations for the removal of cartilage and so forth. He was incapacitated and for a long time was obliged to go about on crutches. But while he was in hospital he received a visitor. This was a clergyman, the minister of the church attended by his wife and children and who happened to be a highly successful minister whom we were told had accumulated a great deal of money. This visit, in terms of its result, appears to have been rather the opposite to a blessing for the invalid because the reverend gentleman had a brother-in-law, an ex-professional football star who had played, in his better days, for the Ti-Cats of Hamilton, who was in need of employment and who seemed just the man to help a bailiff on crutches with his heavier tasks such as vehicle repossessions, especially the difficult ones. Whether the minister mentioned that his brother-in-law Robert Steiner, born March 6th, 1946 was also a drunk and a bully, having been convicted of numerous criminal charges of impaired driving and common assault we don't know.

Acker decided to give the minister's brother-in-law a chance and thus began a relationship which precipitated or at least catalyzed Mr. Acker's close brush with professional ruin.

Mr. Steiner went to work with Acker, which was entirely wrong on the part of both men because he had no appointment as a bailiff or assistant bailiff and, indeed, was no doubt ineligible to receive one because of his substantial criminal record.

Somehow Steiner found out about Acker's bid-rigging deeds and soon got involved in the practice for the benefit of his friends as well. For example, he saw to it that his wife's piano teacher obtained a suitable car at a fair price. Two or three of the transactions referred to in Exhibit 9 are alleged to have been Steiner's deeds and not Acker's. Steiner helped

Acker with repossessions and proved quite helpful and the two men went drinking. It seems that the younger, bigger man, had a greater tolerance for alcohol and Acker got "polluted" on one occasion. Acker gave Steiner a key to his office and the latter soon got into the habit of arriving early and opening Acker's mail and if there was a warrant for a repossession, say for CIBC, he would go out and execute the warrant without informing his employer; at least that was the gist of Mr. Acker's evidence. Before long Acker was getting telephone calls, for example, from a lawyer whose client's car had been repossessed in Acker's name by Steiner with threats of physical violence and assault. Mrs. Acker took a dim view of Steiner because she feared he was leading her husband into a drinking habit. In short, both Ackers soon decided Steiner had to go. But it seems he was not an easy man to fire. However, with trepidation, Mr. Acker eventually told Steiner that he had no further need for his services, making a pretext that he was bringing his wife into a more active role in the business and Steiner's employment was terminated.

Acker's worst fears were realized for Steiner proceeded to demonstrate a malevolence, a persistent, and long lasting, spiteful determination to punish his ex-employer for firing him for which the average person's experience could scarcely find any parallel.

It seems that Steiner next attached himself to a Mr. Lorne Park, a competitor of Acker's.

Mr. Lorne Park, who appeared as a witness for the Respondent, struck us as a strange man. He entered the bailiff industry in 1979 or 80 as a "part time" bailiff while retaining his position with Stelco (in order to maintain an assured income) while "building up" his business as a bailiff. This part time arrangement was limited to a period of five years at the end of which, according to the condition imposed by the Registrar, Mr. Stoddart (whom Mr. Park referred to from the witness box as "Bill"), Mr. Park would be expected to have built up his business sufficiently that he would be able to make it his full time employment.

It has been suggested (by counsel for the Appellant) and we think with considerable possibility or even probability of accuracy, that Mr. Park did what he did, that is, reported the allegations which he had received through Mr. Steiner to the Hamilton-Wentworth Police (and we understand from what he told us that he had to go to the police station three times, each time spending several hours before the police agreed to forward his complaint to the Registrar) from less than

honourable motives including that of eliminating a competitor. He himself described Steiner's feelings towards Acker as "bitter, angry" to which we assume could be added "vengeful". We are not under the illusion that informers and vicious rivals are not without their uses to the police in their work but we found the testimony of Mr. Park very exceptional just the same.

Mr. Park testified that he received "certain documentation" from Steiner which, after he had studied it, convinced him that Acker was a wrong-doer, probably a bid-rigger, which impelled him to go to the police. He also testified that he was, at this time, very much afraid that Steiner, in furnishing this information to him, was trying to "set him up" or as he put it, i.e., as he explained that term to the Tribunal, to get him, Park, into trouble. In other words what Mr. Park made abundantly clear to the Tribunal was that he himself did not trust Steiner at all and was afraid that he was not only a liar but a dangerous liar likely to get him, Park, into trouble as well as Acker. So he felt great trepidation he told us, but, despite that, in order to get the matter "off his shoulders", as he put it, he went to the police.

Was he seeking protection for himself from the police from Steiner? Or was he in some way being intimidated by Steiner and thereby forced or "sandbagged" by Steiner to report Acker to the police? Or is it possible that Mr. Park's motive in doing what he did was simply the elimination of an efficient competitor and to the extent that he and Steiner co-operated to bring this about, could their relationship together be spoken of as a conspiracy to deprive Mr. Acker of his appointment as a bailiff for the purpose of enhancing Mr. Park's business and providing Steiner with revenge?

Sometimes motive may be inferred from result. It is true, as counsel for the Appellant pointed out, that Mr. Park did resign from Stelco and become a full-time bailiff within a short time of Mr. Acker's being charged by the Registrar in the Provincial Offences court. He gave up his Stelco job and went full-time into bailiff practice a year ahead of the schedule he had worked out with Mr. Bill Stoddart. Also, there can be no doubt that Mr. Acker's business all but evaporated after the charges were laid; surely this business had to go somewhere else and can we doubt that Mr. Park, a new entrant into the field, was a beneficiary of that redistribution?

Let us at this point consider the evidence of Mr. M. McAllister, a tow-truck operator, a man of very frank and open countenance and demeanor, whose honesty and candor, so far as we are able to perceive such qualities, were quite transparent. That evidence is encapsulated in a letter of his



own composition which he put in under oath and swore was signed by himself and his son, Larry, in his presence. This letter speaks for itself, as follows:

Bennett's & Tiny's Towing  
613 Dundas Street West  
Hamilton, Ontario  
L9J 1A2

This is my voluntary statement:

On the evening of January 5th, 1982 at 7 p.m. Robert Steiner, Gary McNeil and James D. Lorne Park (Bailiff) came to my place of business, known as Bennett's & Tiny Towing, No. 5 Highway, Waterdown. They told me that they were out to cause James Acker to loose [sic] his Bailiff license at any cost. They informed me that James D. Lorne Park (Bailiff) was going to become big and powerful as a bailiff and they would give me all of their towing and storage if I would help them to get something on James Acker so that he would loose [sic] his Bailiff License. I told them that James Acker was always honest with me and I knew of nothing that he had done that was wrong. I also told them that I had no intentions of having anything to do with any wrong doing against James Acker, or anyone else. And I then went on to tell them if they need my services as towing or storage that I would be happy to oblige at anytime. After a few moments of silence they got up from their chairs, thanked me and left quietly, and I am still waiting to hear from them for all of that towing and storage that they talked about. My son Larry and myself were both present all the time they were talking.

September 7, 1982

"M. McAllister"  
signature

September 7, 1982

"L. McAllister"  
signature

The Tribunal accepts the contents of this letter as true, mainly because we consider Mr. McAllister a decent, truthful man and substantially disinterested, and as well because of the tone and content of the answers given before us by Park when shown it.

Upon a very careful review and consideration of all the evidence the Tribunal is of the opinion that Mr. Park's conduct was likely motivated, at least in part, by a desire to advance his own interest in the bailiff business by eliminating a rival. Such conduct, if proven, would in our view have been underhanded. Whether it has been strictly proven or not, Mr. Park's conduct has at least the smack and savour of a particularly vicious stab in the back.

We know that Mr. Park is not on trial before us. He was called as a witness for the Respondent but in our view did more to benefit the opposite side. (And be it noted that we congratulate counsel for the Registrar for the integrity and purity of motive displayed in giving the Tribunal the assistance provided by this witness, which are among the many fine qualities he has never failed to display). However, Mr. Park's conduct and method of operation fascinate us. For example, he drove to Toronto and went to the Ministry of Consumer and Commercial Relations offices at 555 Yonge Street. There he looked up a group of six or seven trade names in which he knew various small towing businesses in the Hamilton area were being carried on to see if those names were officially registered and finding that some or all of them were not officially registered; he proceeded to register those names in his own name at a cost of \$10.00 each. Thereby he acquired a kind of proprietorship in these names, names under which other people (with whom he had no connection) carried on business. He then further testified that it was his intention to convey or transfer his thereby-acquired interest in at least one of those names to Mr. Roy Porter after the latter had paid him a sum of money (which he told the Tribunal would cover "travel expenses"). Again we look at the definition of fraud quoted earlier in these Reasons, especially the words "a spirit of artifice and scheming and tend[ing] to...injure others" and we ask what was in Mr. Park's mind up to when he registered these names, names of businesses with which he had no connection whatsoever, into his own name? We conclude that he was up to no good.

In short, we do not admire Mr. Park or the way he operates.

We think the purpose of this hearing and whatever disposition results from it should not be to duplicate the function of the Provincial Offences court but to assist the Registrar in his administration and regulation of this industry for the benefit and protection of the consuming public as well as to send signals, by our decisions, for the enlightenment and education of those who engage in the industry.

In the circumstances we feel the Registrar, when contacted by the Hamilton-Wentworth Police, had little option but to prosecute in the Provincial Offences court. However, at this point in time we believe that he has already demonstrated the efficiency and zeal of his staff in tracking down wrongdoing sufficiently to make it clear that irregularities will be detected and not be tolerated - that wrongdoing will be found out and punished.

But we do not think that to take an otherwise efficient, conscientious and reliable bailiff, such as Mr. Acker, with an evident sense of personal pride and jealous of his reputation, and to expel him in ignominious circumstances and disgrace from the bailiff industry would necessarily advance the interests either of the public or the industry. Provided Mr. Acker has learned his lesson, and we believe he has been through a terribly chastening ordeal, intensely expensive and embarrassing, a learning experience such that he is likely to bear what has happened to him in mind in the future, we believe that he should be given one more chance.

The justice of the peace who delivered the decision of the Provincial Offences court seemed concerned, as has been the Registrar, with the irregularities in Mr. Acker's bookkeeping. In the Reasons for proposing to revoke the appointment of James Acker, the Registrar states in B(3) "It is alleged further that during the period of January 1979 to January 1982, Acker failed to keep and maintain books of account as prescribed by section 13(3) of the Bailliff's Act, R.S.O. 1980, Chapter 37." Because of his lack of knowledge of bookkeeping James Acker in 1977 asked L.V. Miller of Miller Accounting firm in Hamilton to keep his books as Miller agreed. Miller, according to Acker's testimony did not know that he needed double entry bookkeeping as required by the Bailiffs Act, Section 13(3). Exhibit 16

shows Acker's unaudited balance sheet relating to the bailiff business December 31st, 1981 done by Miller. We have not dealt at any length with this aspect of the case because we are convinced upon the evidence that the assertions made on his behalf in argument are correct, that is to say, that his bookkeeping though sloppy or inadequate did not reveal any desire or intention to defraud nor any wilful inclination on his part to defy the Bailiff's Act or any other law. In our view, the Registrar may be assured his future bookkeeping will be properly and honestly done through the hiring of a competent accountant and the filing of regular returns.

Mr. Ivan Galland of Doane Raymond substantiated this and said that Mr. Acker told them he wanted double entry bookkeeping and wanted the books done properly and correctly. An audit was not done since Doane Raymond had never before acted for a bailiff and did not know the provisions of the Bailiffs Act. They are presently waiting for Acker to bring his books back for an audit.

In the opinion of the Tribunal the net effect of the proceedings in the Provincial Offences court was that Acker was publicly chastised and punished. It is our further opinion that the purpose of chastisement is to reform and correct. The question before us now is whether Mr. Acker, having been chastised, has been suitably and adequately chastised to ensure the correction and reformation of his ways so that we can say, at this present point in time and looking towards the future, having in mind the wording of Section 9(b), this man in the opinion of the Commercial Registration Appeal Tribunal is competent and with capacity to act responsibly as a bailiff.

In this case the Tribunal is optimistic and the answer is yes.

In the opinion of the Tribunal he has undoubtedly learned much from this ordeal and hopefully will provide efficient and responsible bailiff services at modest rates to the Hamilton-Wentworth community and demonstrate his fitness to practice in this industry.

However, out of regard for the misgivings of the Registrar and in deference to his very proper concerns, the Tribunal attaches the following terms and conditions to its Order:

1. That James Acker submit an audited statement to the Registrar annually (Section (3) and (4) of the Bailiff Act;
2. That James Acker keep a separate trust account in an accredited financial institution for all money received on behalf of other persons Section 13(7);
3. That James Acker refrain from arranging to sell cars unless or until he is registered as a motor vehicle dealer. Repossessed cars must go to an independent auto auction.

By virtue of the authority vested in it under Section 10(4) of the Bailiffs Act and subject to these terms and conditions the Tribunal Orders and Directs the Registrar to refrain from implementing his Proposal and not to revoke the appointment of James Acker as bailiff. \*

\* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Registrar of Collection Agencies under the Collection Agencies Act. The appeal had not been concluded at the time of this publication.

GERALD E. TRYON

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR UNDER THE COLLECTION AGENCIES ACT  
TO REFUSE REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN  
BARBARA SHAND, MEMBER  
SEYMOUR EISLER, MEMBER

COUNSEL: GERALD E. TRYON, appearing in person  
A.N. MAJAINA, representing the Respondent

DATE OF  
HEARING: 26 March 1985 Toronto

REASONS FOR DECISION AND ORDER

In the application form which is the basis of this hearing the Applicant did not answer question No. 7 correctly; to the direction "If yes, give full particulars", he stated:

"Fraud - '77, Fraud '83. Time served - presently on parole til Nov. 28"

He failed to disclose a long list of convictions set out in the Notice of Proposal which the Appellant does not dispute with one exception, January 25th, 1977, that the Tribunal accepts as such.

The Tribunal is on record time and again as to the importance of the application being answered correctly, in that the same forms the basis for the exercise by the Registrar of his judgment. Based on its analysis in individual situations, the Tribunal has time and time again upheld the Registrar's position in the Notice of Proposal in these matters. Cases in this regard have been cited by counsel for the Respondent.

The Tribunal is on record that it does not follow that the incorrect application automatically leads to disentitlement; there is still the exercise of judgment with respect thereto.



The Tribunal reiterates its position that a grave responsibility lies upon the Applicant to complete the application correctly and in full. The Tribunal finds in this instance no reasonable explanation by the Appellant. The Tribunal finds in this instance in respect of the incorrectness and incompleteness to make full disclosure (failure to give full particulars) on the application form that such past conduct of the Applicant affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty.

The Tribunal is not unsympathetic to the Applicant and is cognizant of the tremendous challenge to the Applicant that this decision may create. However, the Tribunal must be mindful of the public interest and the difficulties that the incomplete application form may have led to.

Accordingly by virtue of the authority vested in it under Section 8(4) of the Collection Agencies Act, the Tribunal directs the Registrar to carry out his Proposal and to refuse to grant the registration.

However, the Tribunal reminds both parties of the section in the Act which reads:

Section 9

" A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

BORDEAUX RESTAURANT LIMITED  
(LICENSEE OF BORDEAUX RESTAURANT)

APPEAL FROM A PROPOSAL OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO REMOVE A "TERM AND CONDITION"  
ATTACHED TO THE DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
WATSON W. EVANS, MEMBER  
DENNIS EGAN, MEMBER

COUNSEL: WILLIAM P. SOMERS, representing the Appellant  
CHRISTOPHER J. WILLIAMS, representing the  
City of Scarborough  
MRS. JEAN CUNNINGHAM, representing the Objectors  
LYNDA HUURRE, appearing in person  
S. A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 5 March 1985

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Bordeaux Restaurant Limited, Licensee of the Bordeaux Restaurant situate at 16 Bimbrok Road, in the City of Scarborough, from the Decision of the Liquor Licence Board of Ontario dated the 22nd day of November, 1984, refusing to remove a "Term and Condition" attached to the dining lounge licence of the Appellant, which "Term and Condition" was imposed by the Order of the Board on the 13th day of March, 1980, whereby the sale and service of alcoholic beverages shall cease at 8:00 p.m. daily. It appears that this "Term and Condition" was originally imposed because of the failure of the Licensee to meet the required food/liquor ratio as imposed by the regulations contained in the Liquor Licence Act. The Tribunal was also advised that there had been two prior applications made for removal of the "Term and Condition" pursuant to the provisions of Section 9(2) of the Liquor Licence Act, one in April of 1981 and one in January of 1983, and both of the prior applications were refused. The Appellant has brought this application on the grounds that there is a change in circumstances which warrants the removal of the "Term and Condition".

The first witness called on behalf of the Appellant was Stephen Kochovski who is the principal shareholder of Bordeaux Restaurant Limited, and has been involved in the operation for the past seven years and has been the sole owner of the corporation during the past 14 months. Mr. Kochovski testified that prior to that time he had a partner who owned 40 per cent of the shares but that the business was not prospering and Mr. Kochovski took over sole control of the company and operation. He stated that he manages the restaurant for the period from 12:00 noon to 5:00 p.m. and that his wife takes charge of the restaurant each day from 5:00 p.m. to closing time at 8:00 p.m. He testified that prior to January of 1984 the Licensee did have a rough type of clientele, but that since he took over control of the operation the clientele has changed and now consists mainly of businessmen. The restaurant is located in a shopping plaza consisting of a printing shop and three medical offices as well as the restaurant and is located at 16 Bimbok Road.

Counsel for the Appellant referred the witness to the summary of the food/liquor sales ratio for the months of January, 1984 to September of 1984, inclusive, in Exhibit 6, being the record of proceedings before the Liquor Licence Board, and the witness confirmed that these figures were accurate. The liquor sales for the month of September, 1984, represented 75.6 per cent of the total sales and the best month for the Licensee was February of 1984 when liquor sales represented 69.3 per cent of the total sales. The witness stated that the fact that he must close at 8:00 p.m. drastically interfered with his evening dining room operations and prevented customers from wanting to have dinner at his establishment when they could not obtain wine or liquor with their meal subsequent to 8:00 p.m. Mr. Kochovski testified that he owned another restaurant in the area known as Monsieur Coco and that the liquor licence for this establishment had no "Term and Condition" imposed and he, therefore, was permitted to sell liquor until 1:00 a.m. He stated that the food/liquor ratio for Monsieur Coco was in proper proportion at all times.

The witness referred to pages 10 to 21 of Exhibit 6 which contained copies of 12 pages of petitions from customers of the Bordeaux Restaurant in support of an application for an extension of the hours during which alcoholic beverages may be served with meals. The witness stated that all of the petitions had been signed in the restaurant and included four signatures of restaurant customers who reside on Bimbok Road. The witness testified that there had been a significant change in the operations during the last 14 months, that better food

was served, that there was better management and that there was a better personal relationship with the customers. He acknowledged that there had been complaints in the past, mainly because of a clientele consisting of motorcycle bikers, but that this had all changed since he had taken over control of the operation in January of 1984.

On cross-examination by counsel for the Board, the witness confirmed that the average luncheon check is between \$3.00 and \$4.00, but that evening prices are much higher. He also acknowledged that there was entertainment at the premises consisting of exotic dancers and that they have always had them and there has been no change in the entertainment. He stated that there were seven other restaurants in the area, but he had no knowledge as to whether they had any problems with their food/liquor ratio.

On cross-examination by counsel for the City of Scarborough, the witness confirmed that he was aware of the prior problems with respect to the operation of the restaurant and the type of clientele that frequented the premises. He stated that he had tried to correct the problems with respect to the food/liquor ratio but had not been very successful. He confirmed that since the liquor licence prohibited the sale of liquor subsequent to 8:00 p.m., he also closed the restaurant at that time and had made no attempt to have the restaurant hours extended beyond 8:00 p.m. He also confirmed that he has had a Metropolitan Toronto Adult Entertainment licence for these premises since 1979.

Upon re-examination, the witness stated that if his hours of operation for the sale of liquor were extended, he would be prepared to discontinue his adult entertainment licence. He confirmed that exotic dancers performed from 12:00 noon until closing time at 8:00 p.m.

The next witness called on behalf of counsel for the Appellant was Milly Kochovski, the wife of the proprietor, who stated that she has only worked on the premises during the past 14 months. She stated that the customers appear to be the same type as at Monsieur Coco and are not the type of customers that create problems. The witness was referred to the petitions contained in Exhibit 6 signed in support of an application for the extension of hours for the sale of alcoholic beverages and she stated that the persons who signed were customers who signed in the restaurant. She stated that she does the cooking and was in charge of the restaurant for the last three hours of each business day. The witness did acknowledge that she did

approach some of the residents on Bimbok Road, but that she did so at the request of the Chairman of the Liquor Licence Board in order to determine whether there was support from the neighbourhood.

The next witness called on behalf of the Appellant was Alfred A. Roth, a retired assistant manager of an LCBO store, who stated that he had been a customer of the restaurant for about one year. He stated that he likes the Bordeaux Restaurant but that he does not eat dinner there because time is too short before the 8:00 o'clock closing. He stated that his wife works and does not get home in time to go to the Bordeaux Restaurant for dinner. He stated that he heard that the Bordeaux Restaurant was in trouble and decided on his own to check into the place. He found the clientele quite sociable and has never seen any fights or drunkenness or problems of that kind.

The Appellant called as his next witness Robert N. Forbes who was a customer who went to the Bordeaux Restaurant three to four times per week for lunch or for a drink after work and has been a patron for two and one-half years. He used the restaurant for business luncheons and stated that he was the national sales manager for an appliance company. He stated that he was aware of the change in ownership over the last 14 months and that there had been a significant improvement in the premises. He stated that there were far more white-collar customers, but acknowledged he did not take his family to the restaurant. He stated that he would not go to the Bordeaux Restaurant for dinner since he usually would go out to dinner between 7:30 p.m. and 8:00 p.m. and the Bordeaux Restaurant would be closed by that time. He stated that he would use the Bordeaux Restaurant in the evening for dining if the hours of operation were extended.

The last witness called on behalf of the Appellant was Jennifer Sisson who was the bartender and a waitress at the Bordeaux Restaurant for the last 14 months. Prior to that time she had worked for Mr. Kochovski at Monsieur Coco. She stated that she found the present clientele of the Bordeaux Restaurant very sociable and that they did not create any problems. She worked from 12:00 noon to 8:00 p.m. five days a week and that she found there to be no unusual events other than two minor arguments between customers during the 14 month period and, on both occasions, the customers were barred from the restaurant. She stated that she had been a waitress for 11 years and had taken a course in hospitality training at Centennial College. She stated that the evenings were very quiet as a result of the early closing at 8:00 p.m.



Counsel for the City of Scarborough did not call any witnesses but filed with the Tribunal as exhibits extracts from the Minutes of Council together with the reports of the Law Department to Board of Control. He also referred to pages 22 and 23 of Exhibit 6 which contained a by-law amendment of the Corporation of the City of Scarborough together with the Order of approval of the Ontario Municipal Board, which amendment had the effect of prohibiting adult entertainment parlours except in hotels having 50 or more bedrooms. However, counsel for the City of Scarborough confirmed that the Bordeaux Restaurant would be a legal non-conforming use since it had an adult entertainment licence prior to the passing of the by-law.

The next witness before the Tribunal was Jean Cunningham, a resident of Bimbrok Road, who presented a petition from the residents containing 158 names objecting to the removal of the "Term and Condition". She stated that the main concern of the residents was that if the "Term and Condition" was removed and the restaurant was permitted to serve alcoholic beverages until 1:00 a.m., this, combined with the adult entertainment licence, would create many problems for the residents of the neighbourhood. She stated that the neighbourhood consisted of mainly home owners who were non-transient and that younger families were recently moving into the area. She stated that when the Bordeaux Restaurant was permitted to operate until 1:00 a.m., there were many problems, but that after the 8:00 p.m. closing was enforced, things did improve.

Two further witnesses gave evidence on their own; one, Lynda Huurre, a resident of the area, and the other, Alderman Florence Cruikshank of the City of Scarborough who is the area Alderman. Both witnesses stressed in their evidence that they felt that the problems that arose resulted from the existence of the adult entertainment licence.

Counsel for the Appellant argued that there had been a change in circumstances pursuant to Section 9(2) of the Liquor Licence Act which warranted the removal of the "Term and Condition" and he referred to the evidence of the change in operations since January of 1984. He admitted that there had been a poor operation prior to that time and that friction had developed with the neighbours which continued even though the operation had substantially improved. He confirmed that the food/liquor ratio is out of balance but stated that this resulted solely because of the requirement of the early closing. He referred to Mr. Kochovski's evidence that he had no trouble meeting the ratio in the other restaurant, Monsieur



Coco, owned and operated by him, and which restaurant remained open until 1:00 a.m. He argued that this was the only restaurant to his knowledge in Toronto with this restriction imposed upon it and that it was not practical to expect customers to be able to eat dinner and be out of the premises by 8:00 p.m. He referred specifically to the customers who were called as witnesses. He stated that the restriction inhibits orderly, leisurely dining. Counsel for the Appellant stated that he was prepared to recommend that if the "Term and Condition" was removed, a further condition be imposed by the Tribunal that the adult entertainment licence be surrendered in return for extended hours of operation for the liquor licence and that a condition be imposed that the restaurant hours of operation be extended under the Metro restaurant licence.

Counsel for the Board argued that there must be a change in circumstances in order for the "Term and Condition" to be removed. He referred to the prior circumstances since the premises were licensed in September of 1977, at which time the Liquor Licence Appeal Tribunal found that the restaurant was, in fact, a place of entertainment rather than a dining room. He stated that the entertainment still exists and that the owner has made no real attempt to change the situation. Counsel argued that the Appellant should have made a prior application to increase the hours for the sale of food first and show his good faith by operating a proper dining room and then when this additional evidence is available, the Appellant should make an application for removal of the "Term and Condition".

Counsel for the City of Scarborough argued that the evidence was clear that there had been no change in the circumstances. He referred to the June 6, 1979 Decision of the Liquor Licence Appeal Tribunal, together with the evidence that the ratio is still not being met. The "Term and Condition" was attached in 1979 when the restaurant was not meeting its ratio. He suggested that an appropriate method of changing the restaurant's operations would be to first of all have the hours of the restaurant extended and also to discontinue all forms of entertainment.

The Tribunal is of the opinion that there has been no real change in circumstances sufficient to warrant the removal of the "Term and Condition" originally imposed with respect to the sale of alcoholic beverages. The "Term and Condition" was primarily imposed because of a failure to meet the food/liquor ratio which, at that time, was 50/50. Now the food/liquor ratio under Section 9(6) of Regulation No. 581 under the Liquor

Licence Act requires food sales to be only 40 per cent of the total sales but, on the admissions of the Appellant, the highest food sales in the last year were for February of 1984 when they reached 30.7 per cent, nearly ten per cent short of the required ratio. In the past, the Board has imposed a "Term and Condition" reducing the hours of operation when the ratio cannot be met rather than extending the hours of operation. There has also been no real attempt to change the type of operation from one which stresses adult entertainment to one which stresses the operation of a dining lounge. In the opinion of the Tribunal, there must be a substantial change in circumstances in order for the removal of the "Term and Condition" to be warranted and, in this appeal, the Tribunal finds that there has been no change of circumstances as required by Section 9(2) of the Liquor Licence Act which would justify the removal of the "Term and Condition".

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 22nd day of November, 1984, whereby it refused to remove the "term and condition" attached to the said Licence.

583021 ONTARIO LIMITED  
(J.B.'S CORRAL II RESTAURANT)

APPEAL FROM THE DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO ISSUE A DINING LOUNGE LICENCE  
OR ENTERTAINMENT LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
KENNETH VAN HAMME, MEMBER  
EMIL RINDERLIN, MEMBER

COUNSEL: DAVID A. CROWE, representing the Appellant

S.A. GRANNUM, representing the Liquor Licence Board

JULIA WEST, representing The Ontario Hotel and Motel  
Owners Association and Kenneth Willcocks

LUBA KOWAL, representing the Minister of Consumer and  
Commercial Relations for the Province of Ontario

DATE OF  
HEARING: 7 May 1985

St Catharines

#### REASONS FOR DECISION AND ORDER

This is an appeal by 583021 Ontario Limited from the Decision of the Liquor Licence Board of Ontario dated the 18th day of December, 1984, wherein the Board refused to issue either a dining lounge licence or an entertainment lounge licence for the premises known as "J.B.'s Corral II Restaurant", situate at 189 - 241 Dieppe Road, in the City of St. Catharines.

The applicant had originally applied for a dining lounge licence for the said premises on the 23rd day of August, 1984 for premises with a total seating capacity of 996 persons. Subsequently, the applicant submitted a further application for an entertainment lounge licence in lieu of the dining lounge licence, but the second application was not included in the notices of the public meetings and other proceedings before the Board. On the 23rd day of October, 1984, the Board issued a Notice of Proposal to refuse to issue a liquor licence for either a dining lounge or an entertainment lounge licence and the Appellant requested a formal hearing

before the Board pursuant to Section 11(3) of the Liquor Licence Act. A hearing was held on the 18th day of December, 1984, at which time the Decision of the Board was to refuse the said applications on the grounds that:

- (a) the applicant corporation and its sole shareholder and officer, Mrs. Jean Biasucci, appear to have little or no knowledge of the plans and proposed method of operation of the new facility;
- (b) Mrs. Biasucci, as the principal shareholder of 476535 Ontario Limited, operating J.B.'s Corral Restaurant in Niagara Falls, Ontario, has demonstrated a lack of knowledge and inability to operate or supervise a licensed premises in accordance with the provisions of the Liquor Licence Act, especially as it pertains to achieving or maintaining the appropriate liquor/food ratio; and
- (c) the application for the licence did not disclose a financial interest of Joseph Biasucci in any of the documents submitted to the Board, wherein it appeared that he had advanced the sum of \$100,000.00 towards the construction of the Dieppe Road facility.  
Mr. Biasucci is the husband of Jean Biasucci.

Counsel for the Ministry of Consumer and Commercial Relations made a preliminary objection with respect to the issuance and serving of a subpoena in these proceedings on Willis L. Blair, the Chairman of the Liquor Licence Board of Ontario, who was one of the members of the Board who conducted the public hearing on the 18th day of December, 1984, and the Decision which is the subject of this appeal was issued over the signature of Mr. Blair as Chairman. Counsel argued that Mr. Blair could provide no evidence with respect to the hearing before the Tribunal as this hearing is a "hearing de novo" and the Tribunal must consider the evidence on the merits. She also argued that the evidence of Mr. Blair is not admissible since, although he is a competent witness, he is not a compellable witness. Counsel argued that under Section 12(1) of the Statutory Powers Procedure Act, the evidence of a witness must be relevant and admissible and that the status of Mr. Blair as Chairman of the Liquor Licence Board is the same as an "inferior judge". Counsel argued that the power of the Tribunal to require testimony is discretionary and that the

Tribunal should use its discretion in not requiring the witness to testify. She referred the Tribunal to the case of Re: Clendinning and Board of Police Commissioners for City of Belleville (1977) 15 O.R. (2d), p. 97, wherein Mr. Justice Steele held that a Judge of a Provincial Court is a competent witness before a Board of Police Commissioners, but that he is not compellable. Counsel also advised the Tribunal that in the event the Tribunal found Mr. Blair to be a compellable witness, she wished to exercise her right to ask for an adjournment so that an application for a stated case could be made to the Divisional Court.

Counsel for the Appellant advised the Tribunal that the matters of evidence required from Mr. Blair were with respect to matters which occurred subsequent to the filing of the appeal. He advised that he had not yet made a decision as to whether he would call Mr. Blair and that the objection by Counsel for the Ministry was, therefore, premature until such time as he had actually made his decision in this matter. The Tribunal, therefore, reserved its decision as to whether Mr. Blair was a compellable witness pending his actually being called as a witness in these proceedings.

Counsel for the Liquor Licence Board advised that he was calling no witnesses and would be turning the case over to the objectors to file their evidence. He submitted that the matter before the Tribunal today was strictly the matter of the appeal from the Decision of the Liquor Licence Board dated the 18th day of December, 1984, and that any subsequent matters which had come before a Judge of the Supreme Court in Weekly Court in Toronto were irrelevant.

Counsel for The Ontario Hotel and Motel Owners Association called as her first witness Mr. Kenneth Willcocks who was the past Chairman of the Association. He stated that he had been present at the hearing before the Liquor Licence Board in December and had heard the evidence submitted at that hearing. He stated that the objections made on behalf of The Ontario Hotel and Motel Owners Association were a concern that the property owned by the same principals and operated as J.B.'s Corral in Niagara Falls had not been operating in accordance with law for a number of years. He stated that his source of information came from a meeting that he had with Mr. Willis Blair, Chairman of the Liquor Licence Board, and an inspector of the Board who had recently made inspections of the Niagara Falls premises and that as a result he had been advised that J.B.'s Corral in Niagara Falls had not been meeting its proper liquor/food ratio as required by the Act. He suggested



that the St. Catharines operation would be a mirror image of the Niagara Falls operation. The witness stated that he had inspected the Niagara Falls premises and found that they contained mainly small tables which could not be used for dining, that there were no visible menus and that the premises were not really a dining lounge. He was concerned about the apparent failure on the part of the Licensee to meet the ratio, but he acknowledged that he had no information regarding the ratio. On examination by Mr. Grannum, the witness confirmed that he had not made any survey with respect to the needs and wishes of the community as they related to the application which had been submitted by the Appellant.

On cross-examination, Mr. Willcocks acknowledged that he represents the competitors of the Appellant but that he was not concerned with respect to the competition and was only concerned about the ratio. He further acknowledged that he was not aware that the proposed menus for the Appellant's premises in St. Catharines had been approved by the Liquor Licence Board and he had made no inquiries in this connection. He stated that the premises in Niagara Falls were on a main artery and that there were many other licensees in the area, but that he had not seen the St. Catharines operation. He stated that his main objection is that the Niagara Falls operation does not apparently meet the ratio and he would expect the same thing to happen here. When questioned about the status of Mr. Biasucci, he stated with respect to his financial interest that he was not aware that Mr. Biasucci was merely a simple guarantor to a bank loan. He also acknowledged that the enforcement of the liquor/food ratio in accordance with the regulations under the Liquor Licence Act is the responsibility of the Board.

The next witness called by Counsel for The Ontario Hotel and Motel Owners Association was John K. Bak who is the operator of licensed premises in Port Colborne and was a member of the Association and the zone director for the St. Catharines area. He stated that he represented the hotels in this area and that there were approximately 235 licensed premises in Zone 8. This resulted in 18,000 to 20,000 licensed seats in liquor establishments in the St. Catharines area and that his prime objection was the commercial effect of an additional 1,000 seats for licensed premises in this area. He stated that the failure of the Appellant to meet its ratio with respect to its Niagara Falls operation is of concern. He also stated that 12 hotel owners had appeared at the first hearing and had expressed their concern with respect to the financial impact of this operation. He acknowledged that he had no copies of the reports, but confirmed that he had heard evidence at the



hearing before the Liquor Licence Board that the Appellant was not meeting its proper ratio in Niagara Falls. He stated that the members of his Association were governed by the ratio and that the same rules should apply to all.

When questioned by Mr. Grannum, Mr. Bak confirmed that of the 235 licensees in the St. Catharines area, approximately 52 were members of the Association and that he had received his instructions to object to the licence at a meeting of the members of the Association in the St. Catharines area, which meeting had been held on October 11, 1984.

On cross-examination, Mr. Bak stated that the basis of his objection was that the liquor/food ratio would not be maintained and he acknowledged that he does not represent the public in this appeal, but that he actually was representing the competitors of the Appellant. He confirmed that people were travelling to Niagara Falls and that he was concerned with the competition and that the competition was not in the public interest. He also confirmed that he had stated in previous proceedings that he had no objection to the issuance of an entertainment licence.

The next witness called on behalf of the Association was Mr. Russell Cooper, the Executive Director of the Association for the past four years. He was aware that after discussions with Mr. Skypas, an investigator with the Liquor Licence Board, the liquor/food ratio at the Niagara Falls premises of J.B.'s Corral was not being met and that he believed that certain of the statements filed were false. He stated that he had been advised that the reports were not in conformity with spot-checks that had been made.

Mr. Jack Aitken, the operator of the Hotel Esquire in St. Catharines, was called as a witness for the Association. He confirmed that he had been present at the previous hearings in both October and December of 1984 and he stated that he was not concerned about the possible competition which might be created by J.B.'s Corral II Restaurant especially in this day and age when there is a presumption of a right to a licence. He stated that he was concerned about unfair competition where a competitor was not achieving the proper food/liquor ratio. He stated that he had heard evidence of improper ratios and overcrowding with respect to the Niagara Falls operation of the Appellant but on cross-examination, he confirmed that he only had obtained this information through comments at meetings before the Liquor Licence Board and had no direct evidence in this connection.

A witness called on behalf of the Appellant was Ronald McDonald who carried on an advertising and promotion business for restaurants. He stated that he had a degree in Business Administration from Brock University and had previously worked for the Bank of Montreal in bank audits. He stated that he was involved in the promotion of J.B.'s Corral II Restaurant and had been involved with the licence which had been issued to the Appellant on February 2, 1985 and had the books of account from that date. He stated that he oversaw the ratio statements and was aware of the necessity of maintaining the proper food/liquor ratio. He stated that the ratio had been consistently met since the time of the issuance of the licence on February 20, 1985 until its cancellation on May 6, 1985. Mr. McDonald stated that he had knowledge of the preparation of the petition which was filed as an exhibit and was part of the record of proceedings before the Liquor Licence Board and that the petition was genuine to his knowledge.

On cross-examination Mr. McDonald stated that he was also associated with the promotion of the Appellant's Niagara Falls operation and received his instructions from both Mr. and Mrs. Biasucci. He stated that he had knowledge only of the records which were produced to him and he dated and validated the cash register receipts which were delivered to him. He stated that he was aware of the Niagara Falls operation receipts and had prepared the Niagara Falls records including the food/liquor ratio statements for the period from June of 1984. He stated he was aware of the restrictions on the Niagara Falls operation because of the failure to meet the food/liquor ratio and not because of the filing of any false documents. This was the only witness called on behalf of the Appellant.

In argument Counsel for The Ontario Hotel and Motel Owners Association acknowledged that the evidence produced with respect to the Niagara Falls operation of the Appellant was based on hearsay evidence at other proceedings but that the nature of the proceedings dictated her use of the hearsay evidence. She stated that the direct evidence at earlier proceedings had not been made available on this appeal and that Counsel for the Liquor Licence Board had seen fit not to call any evidence. She stated that the evidence in opposition to the issuance of the liquor licence related largely to the poor track record of the Appellant, particulars of which were as follows:

1. The failure to meet with food/liquor ratio together with the uncontradicted evidence of the Liquor Licence Board's own investigators with respect to false records.

2. Evidence of overcrowding. She acknowledged that this also was hearsay evidence but was the evidence of the inspectors before the Liquor Licence Board.
3. The record of the Decision of the Liquor Licence Board and the record of the proceedings before the Board.

Counsel argued that Mr. Biasucci had both a financial and operating interest in the operation and that there was an obligation to make full disclosure, which obligation had not been fulfilled. Reference was also made to Section 6(1) of the Liquor Licence Act and in particular to subparagraphs (c), (d) and (e) relating to the past conduct of the Applicant and activities carried on in contravention of the Act or Regulations. Counsel submitted that this entitled the Tribunal to examine the Niagara Falls operation and consider the past conduct of the Applicant. Counsel also submitted that Section 6(1)(g) of the Act permitted the inclusion of the witnesses which were called before this Tribunal as being within the definition of the public interest and that these witnesses would be affected, not by competition, but rather by unfair competition. Reference was made by Counsel to Section 55 of the Act which gives the Board the right to investigate a licensee. Counsel referred to the fact that the Board had imposed a term and condition and restricted the hours of operation with respect to the Niagara Falls location operated by the Appellant but this decision of the Board is apparently the subject of an appeal and no formal evidence of the Board's Order was filed with the Tribunal.

Counsel for the Board confined his arguments to the Board Decision itself. He firstly argued that Mrs. Biasucci, the sole shareholder of the Applicant corporation only became involved in the Niagara Falls operation in June of 1984 and that this was the start of her experience. He also argued that she had a lack of ability to operate within the ratio with respect to the Niagara Falls premises which resulted in the imposition of a term and condition. He referred to the third ground upon which the Board based its Decision in that there had not been a disclosure of a financial interest of Joseph Biasucci and that there was no fresh evidence with respect to this matter. Counsel argued that the onus was on the Applicant to show the nature of the financial interest and this onus had not been discharged.

Counsel for the Appellant argued that the proceedings before the Tribunal were a hearing "de novo" and that the Tribunal must make its decision on the judicial findings and the evidence before the Tribunal today. He argued that the Statutory Powers Procedure Act gives the Tribunal the right to accept hearsay evidence but there is a major difference between the question of admissibility of evidence and the weight to be given to that evidence. He argued that an Applicant for a licence has a statutory right to a licence unless there is a preponderance of evidence against the application. He stated that the only evidence today is hearsay evidence of spectators who were present at the prior proceedings before the Liquor Licence Board. He argued that it must be incumbent upon the Board to bring forth direct evidence and that it is not the responsibility of the Applicant to answer hearsay and speculation. He referred to the question of general public interest and argued that this was not the case here. There was no public outcry - no ratepayer groups. The opposition only comes from competitors who want no competition. Reference was made by Counsel for the Appellant that there had been an amendment to the application to provide a maximum seating capacity of 544 persons.

After reviewing all of the evidence before it the Tribunal found that there is not sufficient evidence to warrant the refusal of the dining lounge licence to the Appellant. The Tribunal is faced with the problem of hearing an appeal by way of a hearing "de novo" without any direct evidence being filed on behalf of the Liquor Licence Board. There was no evidence called with respect to the lack of knowledge or experience of Mrs. Biasucci and there was no evidence called with respect to the failure on the part of Joseph Biasucci to disclose a financial interest. The only reference to this was an explanation by his Counsel that his financial interest was by way of a guarantee to the Bank. Counsel for the Board produced no evidence such as the direct evidence of investigators or inspectors with the Liquor Licence Board relating to the failure of the Appellant to meet with proper food/liquor ratios as prescribed by the Act with respect to its Niagara Falls operation. There was reference to a Decision of the Liquor Licence Board as it related to the imposition of a term and condition restricting the hours of operation for the Niagara Falls operation but once again there was no attempt to file with the Tribunal any evidence relating to these proceedings such as a copy of the Decision of the Liquor Licence Board. It was also acknowledged that the Board Order imposing a term and condition was under appeal and was therefore not final. The only direct evidence was the witnesses

of The Ontario Hotel and Motel Owners Association but the evidence of these witnesses related to what they apparently heard as spectators at prior proceedings of the Board. We also have the very confusing but nebulous reference to the fact that the Liquor Licence Board, by a second Order dated February 20, 1985, issued a dining lounge licence for these premises but that on appeal by the Ministry of Consumer and Commercial Relations, the Supreme Court quashed the second Order.

Reference was made to Section 6(1)(g) which refers to the public interest having regard to the needs and wishes of the public in the municipality in which the premises are located but in the opinion of the Tribunal the objections of competitors cannot be classified as indicating the needs and wishes of the public in the municipality. Reference was made to the filing of false statements by the Appellant and to investigations carried on pursuant to Section 21 of the Act but once again there was no direct evidence called to substantiate these allegations. There is no concrete evidence before this Tribunal to justify the denial of the Applicant's basic right to a licence pursuant to the provisions of Section 6(1) of the Liquor Licence Act.

Therefore by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal revokes the Order of the Liquor Licence Board of Ontario dated the 18th day of December, 1984 and directs the Board to issue a Dining Lounge Licence to the Appellant for a maximum capacity of 544 persons.



575547 ONTARIO LIMITED operating as  
KATIE'S ROADHOUSE RESTAURANT

APPEAL FROM A DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO ISSUE A DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
BARBARA SHAND, MEMBER  
ROBERT COWAN, MEMBER

COUNSEL: MILKA VUJNOVIC, representing the Appellant  
S.A. GRANNUM, representing the Respondent  
DEBBIE RUSS, appearing in person

DATE OF  
HEARING: 21 November 1984 Hamilton

REASONS FOR DECISION AND ORDER

This is an appeal by 575547 Ontario Limited from the Decision of the Liquor Licence Board of Ontario dated the 5th day of September, 1984, wherein the Board refused to issue a dining lounge licence to the Appellant for the premises known as "Katie's Roadhouse Restaurant" situate at 1300 Garth Street, in the City of Hamilton.

The Tribunal dealt with certain preliminary matters at the commencement of the proceedings. The Appellant advised that it was amending its application from one for a dining lounge licence for the said premises to an application for a dining room licence to permit the sale of wine and beer only with meals. In addition, the Appellant advised that the name of the premises had been changed from "KATIE'S ROADHOUSE RESTAURANT" to "KATIE'S PLACE". The Tribunal also approved the adding of Debbie Russ, a citizen who had opposed the application before the Liquor Licence Board, as a party to the proceedings.

The Appellant had applied to the Liquor Licence Board for a dining lounge licence on the 20th day of February, 1984, and the Board issued a Notice of Proposal to refuse to issue the said licence on the 18th day of May, 1984. The Appellant requested a formal hearing before the Board pursuant to Section 11(3) of the Liquor Licence Act and a hearing was held on the



5th day of September, 1984, at which time the Decision of the Board was to refuse the application on the grounds that the issuance of a dining lounge licence for the said premises was not in the public interest, having regard to the needs and wishes of the community.

Counsel for the Board called as his first witness Miss Russ who resides approximately 300 feet west of the Appellant's premises. Miss Russ advised that she was opposed to the issuance of a licence, but was not opposed to the restaurant, itself, and she had been instrumental in taking up a petition in an area of approximately four square blocks adjacent to the restaurant premises where she felt people were most directly affected by the issuance of a licence. She stated that her basic concerns were the existence of two schools, one a separate school and one a public school, with approximately 1,100 students, which schools are situated at the end of Garrow Drive and there are many activities carried on for children at the schools. Miss Russ stated that approximately 50 per cent of the children passed the intersection of Garth Street and Garrow Drive which is the location of the plaza containing the Appellant's restaurant. There is a variety store in the plaza and there is a school crossing guard at this intersection. Miss Russ stated that there was also a public bookmobile which came into the plaza for three hours on Thursday night each week. She stated that there had been in the past a great deal of vandalism, some from drinking teenagers, and there were incidents of cars being damaged. Miss Russ expressed her concern about property values being reduced in the event that a dining lounge licence was issued. She stated that there were now three empty stores in the plaza and that a new addition to the plaza with five to six proposed new stores was being constructed at the present time. Miss Russ stated that within a ten minute drive from the corner of Garth Street and Garrow Drive there were 22 licensed restaurants on Upper James Street, and she stated that the zoning for the total area of this neighborhood is residential except for the plaza which is zoned commercial.

On cross-examination, Miss Russ stated that she represented concerned citizens of the area, although there had been no formal organization created. There had been three meetings of citizens in the period of March and April in 1984 at Miss Russ's residence and approximately eight to ten people attended each of the meetings. She stated that she had always been concerned with activities in the plaza and had previously called the police because of people "hanging around" the plaza. She stated that older teenagers presently created

problems, but she acknowledged that she had not contacted the owners with respect to these problems because they had no authority. She felt that there was presently a serious drinking problem and that this problem would increase if the premises were licensed. She was concerned about the behaviour of patrons after they would leave the licensed premises. Miss Russ stated that she did not think that the issuance of a dining room licence would alleviate the drinking and driving problem presently existing in the area. She stated that she had never been in the restaurant, but had no objection to the restaurant, itself.

The next witness called on behalf of the Board was Sister Claudia, the Principal of St. Catherine of Siena Separate School. She had originally filed a letter of objection with the Liquor Licence Board. She gave evidence that there were approximately 400 students attending her school and she was opposed to the licence because of the location of Katie's Place. She stated that as an educator she was concerned about the welfare of the students and she felt that the licence would increase the danger to her students. She stated that two children in her school had been sexually molested in the past year and she felt that the availability of alcohol would compound this problem. She stated that there was presently a lot of loitering around the school and that the issuance of a dining room licence could increase vandalism at the school.

On cross-examination, Sister Claudia stated that there had been no approach by parents to her showing concern about the issuance of a licence, but that these were concerns of her own. She said that there were various evening activities at the school, including Cubs, Scouts, Brownies and Guides, and that during the noon hour a lot of children would leave the school to go to the variety store in the plaza to buy candy. She felt that the issuance of a licence would bring the problems of society closer to the schools and residences in the neighborhood. She stated that she was appearing to express her personal concerns.

The next witness called on behalf of the Board was James Alexander Bethune who was the Alderman for Ward 8 on the Municipal Council for the City of Hamilton. Mr. Bethune stated that he had had numerous calls opposing the application and that he opposed the application because of the opposition of certain residents in the area and the history of previous problems in the plaza. He stated that, in his opinion, the issuance of a dining room licence would compound these problems

and that he was expressing the concerns of the educators in the area. On cross-examination, Mr. Bethune stated that he had no record of the number of phone calls received, but that he felt that he represented the people who had signed the petition in opposition to the application for the licence. He stated that he had supported applications for licences in the past, but could not recall what applications he had supported. He stated that he had never been called personally with respect to vandalism problems in the plaza. He stated that he was present today as an Alderman representing his Ward and that no formal action had been taken by the Municipal Council of the City of Hamilton with respect to the application. He stated that he had no comment with respect to the suggestion of an earlier closing time in the event that a licence was issued. He stated that he had attended at Katie's Place and that they were nice, pleasant premises and that he had no problem with respect to the restaurant.

The next witness called on behalf of the Board was Brian Albert Charlton who is a member of the Provincial Legislature for the Riding of Hamilton-Mountain. The premises and neighborhood are not located in his Riding, but he had been approached by a group of people in opposition to the licence about two weeks prior to this Appeal in view of the fact that the Member of the Legislature for the Riding in which the premises and neighborhood are situate had recently resigned. Mr. Charlton was not aware of the specific problems at this location, but he stated that his constituency office received many calls each week from people in his Riding expressing concerns about the makeup of their community. He stated that there was increasing vandalism and violence everywhere including increased charges for impaired driving and that he felt there was a growing concern within the community as a whole that there were already enough licensed premises in the municipality.

On cross-examination, Mr. Charlton advised that the only complaints he had ever heard with respect to Katie's Place were from Miss Russ and the group present today. He acknowledged that there had been one application for a dining lounge licence within his Riding in a similiar area and he had not objected to that application. He stated that he had no knowledge of the particular issues with respect to this Appeal.

Counsel for the Board called two additional witnesses who were residents in the immediate area and who opposed the application. Each was concerned with the present problems that occurred in the plaza with illegal drinking, beer bottles being

left on the lawns of properties in the area and the noise which will occur in the summer months when the windows are open. One witness, a Mrs. Helen Harding, stated that she was opposed to the sale of "booze" and was even opposed to the existence of the restaurant in the plaza. She stated that she was now disturbed by the sound of car doors of people going to the Mac's Milk and the variety store in the plaza.

Sister Claudia was recalled briefly with respect to further vandalism which was occurring in the area of the two schools but, on cross-examination, she confirmed that in her opinion there was now less loitering at the plaza and that the young people who were loitering in the area had moved from the plaza to the school yards to do their illegal drinking.

Counsel for the Board referred the Tribunal to the evidence in opposition to the issuance of a licence which had been filed before the Liquor Licence Board and this consisted of a petition containing approximately 160 names together with approximately 60 letters. Included in the 60 letters were approximately 45 letters which were a form letter written on the stationery of West Highland Baptist Church and apparently signed by members of that congregation. The great majority of those letters contained no information or evidence as to the place of residence of the persons signing the letters.

Counsel for the Appellant called as her first witness Mr. Maurice Young, one of the principals of MHY Investments Inc., the owner of the plaza where Katie's Place is located. He stated that the plaza was originally constructed in 1976 and that The Royal Bank of Canada was the lessee of the premises where the restaurant is now located, but that the Bank had closed its branch as part of a plan to consolidate branches in the area and the premises had been vacant for approximately 14 months. Mr. Young stated that a new addition to the plaza was presently under construction containing 11,900 square feet and this would double the size of the plaza. He confirmed that this property was zoned commercial which permitted the construction of the plaza and the use of the premises for a restaurant and dining lounge. He stated that his company owned two other plazas of a similar nature in the Hamilton area and that there were dining lounge licensed premises in each of these plazas. He stated that he had never known of any complaints by residents in the areas of the other two plazas. He stated that it was the landlord's responsibility to provide proper maintenance for the clean-up of garbage and that there had previously been complaints from the neighborhood about garbage being on the unconstructed portion of the plaza, but



that since the balance of the plaza area was the subject of the new construction he felt that this problem had been alleviated. He stated that the plaza provided a total parking area for 97 cars which is substantially in excess of the by-law requirements for a commercial plaza of this size. He stated that the rear of the plaza was fenced with a double wood fence five feet high and that elaborate landscaping plans for the plaza had been included as part of the site plans filed with the Municipal Building Department and this landscaping would be completed in the spring of 1985 when construction was finished. Mr. Young stated that he supported the application and felt that the concerns of the residents in the area as indicated by the evidence given to the Tribunal were magnified. He stated that there had been a lot of illegal drinking in the plaza and that he found many empty beer bottles on the roof of the old section of the plaza when they were commencing construction.

On cross-examination, Mr. Young was questioned with respect to the existing plaza at Gage and Edwina Streets and confirmed that he had never had any objections. He stated that there was a school immediately to the rear of that plaza and that the existence of a dining lounge in the plaza did not appear to create any problems with the school.

The next witness called for the Appellant was William Paul Reynolds, the President of the Appellant corporation. He started the construction of the restaurant in January of 1984 and the restaurant was opened for business on May 22, 1984. He stated that the cost to construct and furnish the restaurant premises was approximately \$100,000.00 and that the restaurant has a seating capacity for approximately 110 persons. He stated that it was the intention of the applicant to operate a family restaurant and that there was to be no dancing or entertainment of any kind and that this was presently prohibited by the by-laws of the municipality. Mr. Reynolds stated that the applicant had amended its application to one for a dining room licence permitting the sale of beer and wine only with meals in order to indicate his good faith to the community that this operation was not a "tavern" or "roadhouse". The name "roadhouse" had apparently created a great deal of apprehension in the minds of some residents and resulted in a change of the name for the premises. Mr. Reynolds stated that he had talked to many people in the area and that, in his opinion, 80 per cent of the people in the neighborhood were in favour of the application. He stated that the closest present licensed premises were on Upper James Street which was approximately a 45 minute walk.

Mr. Reynolds filed as exhibits approximately 2,000 letters which were in support of the application for the licence. Mr. Reynolds stated that these letters had been printed by him for distribution on a door-to-door basis and some had been left in the premises to be picked up. Counsel for the Appellant had divided the various letters of support into sections indicating 15 different categories. Mr. Reynolds acknowledged that approximately 400 letters were signed by people who did not live in the general area and were on the west side of the mountain. He stated that the general response of his canvas was that people in the neighborhood do want a place where they can walk to and have a drink with their meal. Mr. Reynolds stated that he had had several meetings in the restaurant with groups in the community and that he had received a letter of support from the Gormley Community Council whereby the executive of that community group supported the issuance of a licence. Mr. Reynolds advised that the Gormley Community Council covered the area lying east of Garth Street. Mr. Reynolds stated that when he first took over the bank there had been some vandalism in the area, but that he made a policy of keeping children away from the front of the restaurant and that this problem had almost completely disappeared. Mr. Reynolds reviewed the letters of objection which had been filed before the Board and he stated that approximately 70 per cent of these letters which were filed by members of the West Highland Baptist Church were from out of the area. He also examined the petition of approximately 160 signatures and he stated that an examination of the place of residence of the various petitioners indicated that many of them were also out of the area. Mr. Reynolds stated that the area definitely needs a family-style restaurant and that the premises would be a general benefit to the community.

On cross-examination, Mr. Reynolds acknowledged that the printed letters of support had been distributed on a door-to-door basis or left in mailboxes and that he had returned on a couple of occasions to pick up letters, although some people had brought the letters directly into the restaurant. He stated that he saw approximately 50 per cent of the people sign the letters of support in the restaurant. Mr. Reynolds stated that there are approximately 5,800 people living in the neighborhood and that since the restaurant has a capacity of approximately 110 persons he would not have to attract people from out of the area in order to have a viable business. When questioned as to the hours of operation for a dining room licence, Mr. Reynolds indicated that he was agreeable to a reduction in hours and that he would be prepared to bow to the wishes of the community.



The next witness called on behalf of the Appellant was Mr. Duncan Beattie who was a Member of Parliament from 1972 to 1974 and is familiar with the Appellant's restaurant. He stated that it was a clean, well-managed premises. Mr. Beattie is a general insurance agent in the area who lives approximately two miles away and has a business on the mountain. He stated that because of the lack of any kind of a liquor licence it was not appropriate for him to have business lunches at the restaurant. On cross-examination, Mr. Beattie acknowledged that there were licensed premises available on Upper James Street, but that it was of benefit to the community generally to have a licensed premises in the immediate area where patrons would not have to drive. He stated that he felt that the Appellant had made a mistake in originally including the name "roadhouse" as part of the business name.

The next witness called by the Appellant was Trina Johnston who lives in the immediate area north of the restaurant. Mrs. Johnston has two children ages 11 and 15 who attend Riddell Public School which is the public school in the immediate area. Mrs. Johnston stated that she has resided in the area for ten years and had signed a letter in support of the application for a licence, and she and her family are regular patrons of the restaurant. She stated that she had talked to many people in the area and she felt that the majority of people were in support of the issuance of a beer and wine licence for Katie's Place. She stated that she had no concern with respect to the safety of her children as they walked by the restaurant. She stated that there had been some vandalism in the general area but nothing outrageous. She stated that Katie's Place was a good quality restaurant and that she, on occasion, would send her son to the restaurant for lunch. On cross-examination, Mrs. Johnston stated that she would support the application even if her residence was immediately adjoining the plaza.

The next witness called for the Appellant was Brian Purdey who lives in a townhouse with his family immediately behind the plaza. He has two children ages 5 and 13 who go to Riddell Public School, and Mr. Purdey has resided at his present address for the last two and one-half years. He stated that there was a previous problem with respect to vandalism in the area in that there was a greenbelt area immediately to the north of the schools which had not been maintained for over three years and contained a large amount of bush. This was an area for a proposed route for the mountain access road and there were a great many teenage parties each weekend. However, the municipality has now cleaned up this area and it has been

landscaped and fenced, and this has greatly reduced the attraction to underage drinkers in the area and there are not nearly the problems that existed two years ago. Mr. Purdey had approached Alderman Bethune and members of council together with other residents of the area to have this matter rectified and he was so concerned that he was prepared to move from the area two years ago. Mr. Purdey also stated that there are not nearly the problems that previously existed in the plaza. He knows Katie's Place and takes his family there on occasion. He stated that it was a good family-style restaurant and he had spoken to many people in the area who support the application for the licence. Mr. Purdey stated that he owns his own house and is not concerned about any reduction in property values and that with the improvement in the quality of the plaza this will be of general benefit to the neighborhood.

The last witness called by Counsel for the Appellant was Mr. Michael Riley who resides approximately three blocks from the plaza. He stated that he had been to Katie's Place on various occasions with his family. He confirmed that he was in the food processing business and provides potatoes to Katie's Place. He stated that, in his opinion, Katie's Place would be a good place for business lunches if there was a licence available.

Counsel for the Board, in argument, stated that the Tribunal is governed by the wording of Section 6(1)(g) of the Act which refers to the needs and wishes of the community. He stated that the Tribunal must consider the expression of "needs and wishes" as being bona fide and that the people in the immediate area must be considered as being the most seriously affected. He referred to the evidence of Mr. Young, the landlord, that there was still some vandalism in the area and that those citizens who are opposed are genuinely concerned that the situation will be worsened. He referred to the evidence of Mr. Bethune, the Ward 8 Alderman, who was of the opinion that the sale of liquor would compound the problem especially with a 1:00 a.m. closing. He also referred to the concerns of Mrs. Harding with respect to the noise late at night. Mr. Grannum referred to the evidence of Mr. Reynolds, the President of the Appellant corporation, who admitted that the licence for him was a matter of survival, but that economic conditions are not matters which should be taken into consideration by the Tribunal and that this is not a test of the Act. Mr. Grannum submitted that on the basis of the evidence before the Tribunal there was no reason to change the Decision of the Board.

Miss Russ, who had been added as a party to the proceedings, argued that the issuance of a licence would be incompatible with a residential area. She stated that the present hours of operation were very inconsistent because of financial difficulties and that the sole purpose of the application was to permit the business to survive. She argued that there was a lot of pressure in the community opposed to the licence and that the community should have a say as to how it survives. She stated that there would be no guarantee as to what the situation would be after the issuance of a licence.

Counsel for the Appellant argued that the onus was on the objectors and the Board to show that the issuance of a licence is not in the public interest having regard to the needs and wishes of the public, and she referred to the case of Re: Donwood Restaurant Limited, (1981) 5 LLAT, page 16, which referred to the question of the onus as being on the Board and the objectors. Counsel stated that regardless of the original name of the operation, it is a restaurant and that the use of the name "roadhouse" was very unfortunate. She referred to the many letters from the West Highland Baptist Church which were opposed to the establishment of a Bar. She stated that all of the evidence with respect to the restaurant was that it was a good restaurant with high standards. The problem of vandalism is a matter of concern for the whole community and the owners of the plaza and the licensee cannot be held responsible for the moral problems of the total community.

The pertinent matter to be dealt with in this Appeal is whether the application for a licence is in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located. There is nothing before the Tribunal to challenge the evidence that the present restaurant is being operated in a proper manner or that the operation of the restaurant has any detrimental effect to the neighborhood. There was also substantial evidence that the problem of underage drinking and vandalism in the area had decreased recently and the Tribunal was impressed with the evidence of Mr. Purdey in this respect. The Tribunal reiterates the Decision in the Donwood case which puts the onus on the Liquor Licence Board and the objectors to the licence to show that the issuance of the licence is not in the public interest having regard to the needs and wishes of the public. The Tribunal finds that this onus has not been satisfied. The witnesses called on behalf of the Board consisted of three residents, Sister Claudia, the Principal of the separate school, the local Alderman and the Member of the Legislature for an adjoining Riding who gave no direct evidence.

Approximately 60 letters were filed in opposition to the application but, as was previously stated, a majority of these letters were filed by members of the West Highland Baptist Church and they were a form letter objecting to a Bar. There was also a petition of approximately 160 names in opposition to the original application for a dining lounge licence.

The evidence submitted on behalf of the Appellant was provided by the Appellant, the plaza owner, three residents of the immediate area and the evidence of a former member of Parliament who is a businessman located approximately three miles away. In addition, there were approximately 14 specific letters of support together with nearly 2,000 form letters of support which were filed on behalf of the Appellant. Counsel for the Appellant had broken down the form letters of support into streets and this enabled the Tribunal to look at the letters of support coming from the streets in the immediate area. This revealed that approximately 193 letters of support came from three streets in the immediate area of the restaurant, namely Garrow Drive, Cranbrook and the Greendale and Greenvale area. Many other letters came from a radius of approximately three to four blocks. In addition, many members of the public attended this Appeal and out of those who signed the sheets made available, ten persons, including those who testified, stated that they were objecting to the issuance of a licence while 65 persons, including those who testified, stated that they were in favour of the issuance of the licence. An examination of the addresses of those persons in support of the application indicated that 36 persons were from inside the area of the immediate neighborhood while 29 persons were from outside the neighborhood area. There is no problem with respect to zoning or parking. The Tribunal also notes the fact that the application has been amended to that for a dining room licence and has also recognized that the Appellant has no objection to a reduction in the hours of operation for the sale and service of beer and wine.

The Tribunal, therefore, revokes the Decision of the Liquor Licence Board dated the 5th day of September, 1984 and directs the Board to issue a dining room licence to the Appellant, subject to the limitation for the hours of operation for the sale and service of beer and wine to be between the hours of 11:00 a.m. to 11:00 p.m., Monday to Saturday, and 12:00 noon to 11:00 p.m. on Sunday.



566469 ONTARIO LIMITED  
(LICENSEE OF GIGI'S CAFE RESTAURANT)

APPEAL FROM A DECISION AND ORDER OF  
THE LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE  
DINING LOUNGE LICENCE.

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
HELEN MORNINGSTAR, MEMBER  
R. CHEMIJ, MEMBER

COUNSEL: S.A. GRANNUM, representing the Respondent

No one appearing for the Appellant

DATE OF  
HEARING: 12 February 1985 Toronto

#### DECISION AND ORDER

Upon reading the record of proceedings before the Board and upon hearing submissions by counsel for the Board, the Tribunal determines as follows:

1. The Appellant was sent by registered mail the Appointment for and Notice of Hearing the 28th day of November 1984 as evidenced by Exhibit 2 which states:

"....the hearing by the Commercial Registration Appeal Tribunal will be held in the Tribunal's chambers, 1 St Clair Avenue West, Toronto on Tuesday, the 12th day of February, 1985 at 9:30 o'clock in the forenoon...."

which contains the further notice:

"....if you do not attend at the hearing the Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings.

2. The Appellant has not appeared.

BY VIRTUE OF THE AUTHORITY vested in it under Section 7 of the Statutory Powers Procedure Act and under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 18th day of September 1984 and directs the Board to set the date of the commencement of the said "Term and Condition".

DERWYN F.A. FOLEY

APPEAL FROM A DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO APPROVE THE ISSUANCE OF A DINING LOUNGE LICENCE

IN RE CHRISTOS LAMPROPOULOS,  
(RUNNYMEDE VILLAGE RESTAURANT)

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE CHAIRMAN AS CHAIRMAN  
BARBARA SHAND, MEMBER  
ROBERT COWAN, MEMBER

COUNSEL: DERWYN F.A. FOLEY, appearing in person.

EDWARD JUPP, Q.C., representing Christos Lampropoulos

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF  
HEARING: 11 July, 1985

REASONS FOR DECISION AND ORDER

This is an appeal by Derwyn F.A. Foley from the Decision of the Liquor Licence Board of Ontario dated the 15th day of February, 1985, whereby the Board approved the issuance of a dining lounge licence to the applicant for the premises known as "Runnymede Village Restaurant" at 534 Annette Street in the City of Toronto.

An application for a dining lounge licence had been made on the 15th day of October, 1984 and, after a public meeting held on the 8th day of January, 1985, the Liquor Licence Board issued a Notice of Proposal to refuse to issue a liquor licence to the applicant. The applicant requested a formal hearing before the Board pursuant to Section 11(3) of the Liquor Licence Act and a hearing was held on the 31st day of January, 1985, at which time the Decision of the Board was to approve the application for the dining lounge licence, which decision resulted in this appeal.

The first witness called by the Appellant was Mr. William H. Temple of the West Toronto Inter-Church Temperance Federation who traced the history of the liquor legislation affecting the area resulting in an area known as the City of



West Toronto being voted "dry" by the residents. It would appear from the evidence submitted that Annette Street forms the boundary between the "wet" area and the "dry" area, but that the premises known as 534 Annette Street which are the subject of the application are not within the "dry" area. Mr. Temple stated that he objected to the will of the people residing in the area being defeated without anybody expressing any desire for the approval of a licence.

On cross examination Mr. Temple was referred to the "Quiet Corner Restaurant" which is a licensed dining lounge on the north side of Annette Street west of the applicant's premises, but he was not aware of that establishment. Mr. Temple stated that he objected to all applications for liquor licences issued in the City of Toronto.

The next witness called for the Appellant was Yuri Shymko, the member of the Provincial Legislature for High Park - Swansea. He submitted that the strip of land along the north side of Annette Street had always been traditionally respected as being part of the West Toronto "dry" area and that the Liquor Licence Board in prior applications had accepted these boundary lines and that this was the first time that the question of the exact location of the boundary had arisen. He stated that boundaries for the prior referendums had included these lands and did not understand why a licence had been granted to the "Quiet Corner Place". The witness asked the Tribunal to look at the needs of the area. He stated that the area was bound by arterial roads and that the nature of the community is reflected in many ways. He argued that the issuance of a licence across the street from the "dry" area is reversing the intentions of the people in the area. He also referred to various licensed establishments on the south side of Bloor Street as more than enough to fulfill the needs of the residents. He stated that to assess the wishes of the residents of the area the Tribunal must look at the results of the referendums held in the "dry" area in 1972 and 1984, whereby in both referendums a majority of the persons casting votes opposed the sale of spirits under a dining lounge licence.

On cross examination the witness confirmed that he did not live in the area but was a resident of the City of York and lived north of St. Clair Avenue. He also acknowledged that the residents on the north side of Annette Street did not have the right to vote in the plebiscite. He stated that his objection was based on the principle of Section 6(1)(g) of the Liquor Licence Act which dealt with the question of the needs and wishes of the residents of the municipality.

On cross examination by counsel for the Liquor Licence Board the witness confirmed the location of various licensed premises on the border of the "dry" area, including premises on the south side of Bloor Street, the north side of Bloor Street west of Jane Street and on Dundas Street. At this time, counsel introduced a letter from the City Clerk for the Corporation of the City of Toronto confirming that the premises at 532 and 534 Annette Street appear to be outside the boundaries of the former City of West Toronto and, therefore, outside of the "dry" area.

The next witness called by the Appellant was Mrs. Erma Pattison, the Executive Assistant of Alderman William Boytchuk, and she read a statement on behalf of Alderman Boytchuk. He stated that a large area to the east and south of the proposed licensed premises voted in favour of prohibition and that there was already one family-type restaurant on the north side of Annette Street to the west of the applicant's premises, which restaurant was identified as the "Quiet Corner Restaurant". He stated that there was no adequate parking and that the issuance of a licence would create traffic problems for the area.

On cross examination the witness, who lives within the "dry" area on Jane Street south of Annette Street, confirmed that there was only one licensed premises on the north side of Annette Street and that no traffic study had been done to determine the effect of an 85-seat restaurant. She stated that the area was one of modest owner occupied homes and that she had heard of complaints with respect to the "Quiet Corner Restaurant", but that there had been no change in the character of the neighbourhood.

The next witness called on behalf of the Appellant was Mrs. Betty Britton who is the proprietor of a small shop at the intersection of Annette Street and Runnymede Road. She had commenced a petition and had presented a petition of 850 names opposed to the application for the licence at the hearing before the Liquor Licence Board in January of 1985 and, at this time, presented a new petition containing a total of 996 names. She suggested that the total of the two petitions indicated the opposition to the granting of a licence. She stated that there were 19 businesses at the immediate four corners of Annette Street and Runnymede Road and that 15 of the 19 businesses had signed the petition opposing the issuance of a dining lounge licence. She argued that parking is poor within the area and that there are four bus stops at the corner of Annette Street and Runnymede Road and that the issuance of a dining lounge licence would create a serious problem for ladies at night.

On cross examination Mrs. Britton confirmed that she operated a small secondhand children's clothing and toy shop called "Betty's Nifty Thrifty Shop" which is located four doors from the corner of Annette Street and Runnymede Road. She stated that some customers drove to her premises but that most came from the neighbourhood and walked. She stated that restaurant patrons always would stay far longer than people dropping in to buy from the shops and that this would intensify the parking problem. The witness acknowledged that one of the businesses in the area was a real estate broker with several sales personnel, all of whom have cars, and that the clients of the real estate office often parked on the street to the west of the office. She acknowledged that most shops were closed in the evening and she had no knowledge of renovations being made to various residential properties for future commercial purposes on the south side of Annette Street. The witness stated that she did not know Mr. Foley, the Appellant, until about two days before the Liquor Licence Board hearing but had started the petition on her own. She stated that she was a total abstainer but that many of her customers would take a drink and that many people who had signed the petition stated that they would go outside of the area for their recreation.

The Appellant then gave evidence to the effect that he lived in the "dry" area to the south of Annette Street and he reviewed the previous proceedings before the Liquor Licence Board. He stated that the Board had no jurisdiction as to the type of entertainment or the amount of parking requirements, but that the issuance of a dining lounge licence for an 85-seat restaurant will create many further parking problems. He stated that the motivation of the witnesses is for peace and quiet within the neighbourhood.

On cross examination Mr. Foley confirmed that he was President of the West Toronto Inter-Church Temperance Federation but that he did not have a copy of any resolution authorizing him to oppose the application on behalf of that federation. He stated that this organization had existed in various forms since 1921 and that it had an executive of 12 members trying to protect the borders of the former City of West Toronto. He stated that he was not objecting to unlicensed premises but only to the issuance of a dining lounge licence. He stated that he had no knowledge of the applicant's financial position, but that he was opposed to the application because it may be the start of an area similar to the area which now exists in the "the Beaches".

The first witness called by counsel for the applicant was Miss Joanna Meropoulos who resides at 104 Evans Avenue within the "dry" area, and she confirmed that the "Quiet Corner Restaurant" is located on the north side of Annette Street at the corner of Evans Avenue. She stated that she is the proprietor of the Becker's Milk Store at the corner of Annette Street and Runnymede Road and passes the "Quiet Corner Restaurant" two or three times a day. She stated that she had never seen any problems at that restaurant. Her shop usually closes at 11:30 p.m. and she stated that she passed by the "Quiet Corner Restaurant" on her way home at night. She stated that she owned the building in which her business was located and she proceeded to review the various establishments located in the area of Annette Street and Runnymede Road. She stated that rather than there being 19 businesses as stated by a previous witness, there were actually 31 businesses within the radius of the four corners. In addition, there were stores under construction at various locations within the area. The witness stated that she supported the application and could see nothing wrong with a dining lounge licence being issued to a small restaurant.

The applicant, Christos Lampropoulos, testified that he presently resided at 521 Annette Street and operated a grocery store at that location. He confirmed that his brother, Gus Lampropoulos, who had 20 years' experience in the restaurant business would be working for him in the new restaurant and that he intended to open a family restaurant in order to serve the immediate neighbourhood. He stated that preliminary plans only had been prepared indicating a seating area of between 80 and 85 seats and that his operating hours would be from 7:00 a.m. to 11:00 p.m., Monday to Saturday. He confirmed that he had had no market survey as to the success of the restaurant but that he had had confirmation from the City Clerk that the restaurant would be located within a "wet" area. The witness confirmed that he had placed a petition in his store in support of the application for the dining lounge licence containing a total of 205 names, and a copy of this petition was filed as an exhibit. The witness also filed as an exhibit confirmation that the premises were approved for commercial zoning under By-law No. 20623 of the City of Toronto which permitted the establishment of a dining lounge. He stated that the Liquor Licence Board required proof of financial ability to construct and operate the premises and that he had satisfied the requirements of the Board.



Under cross examination the witness stated that he felt that he was being discriminated against and that the people circulating the petition in opposition to the issuance of the dining lounge licence were unfairly referring to the possibility of drunkenness and automobile accidents in the area as reasons for opposing the application. In answer to a question from the Appellant, the witness argued that the referendum in 1984 dealt only with the premises in the "dry" area on the south side of Annette Street and did not apply to the area north of Annette Street. He stated that, in his opinion, the residents of the area could now walk to a license restaurant and that the risk of driving under the influence of alcohol is reduced.

In argument, the Appellant stated that the Board, under its Notice of Proposal, had refused to issue the licence after the public hearing but that it had reversed itself. He argued that the Decisions of the Chairman of the Liquor Licence Board and the Decision of the Board conducting the public hearing on January 31 were contradictory. He referred to the fears of the people in the area expressed to those people circulating the petition and that the fact that 1,300 people had signed the petition was of utmost importance to indicate that the majority of the people, irrespective of boundaries, did not want the licensed premises and that the voice of the people must be heard. He argued that the granting of a licence will weaken the foundation of the community and that the location of the line down the centre of Annette Street is not important. He argued that the Liquor Licence Board had the discretionary powers to consider not only the legal factors involved but also the welfare of the general area.

Counsel for the applicant argued that the Appellant misunderstood the procedure and that the Notice of Proposal signed by the Chairman of the Liquor Licence Board was only to set out the issues. He stated that there was no doubt from the evidence before the Tribunal that the proposed dining lounge was located outside of the former City of West Toronto and that Exhibit number 15 established the limit as being down the centre of Annette Street. Counsel referred to the Decision of re Temple and the Liquor Licence Board of Ontario, D.L.R., Volume 145, 3rd Edition, 480, which was an Appeal by Mr. Temple with respect to another application for a liquor Licence and in view of the Divisional Court the gambit of public participation is limited to the needs and wishes of the public in the municipality in which the premises are located. All other matters with respect to finance, premises, etc. are of no concern to the community. Counsel also referred to the fact

that the applicant's petition was set out in detail and was properly headed and was merely left for people to sign in the applicant's grocery store, while the petition of Mrs. Britton was a door-to-door petition, and counsel argued that the Tribunal must take into account the difference between an active as opposed to a passive petition. He stated that the results of the referendum in 1984 were not significant with respect to this application in that the people supporting the "dry" position were well organized while the people voting in support of licensed premises were unorganized. He also stated that the residents to the north and west of Annette Street were not entitled to take part in that vote and that the premises which are the subject of this application are within that area. Counsel also referred to the fact that Mr. William Temple is a well known professional temperance worker who opposed all liquor applications. He stated that the proposed licensed restaurant was a small restaurant with a maximum of 85 seats. Counsel argued that pursuant to the provisions of Section 6 of the Liquor Licence Act an applicant is entitled to a licence unless he fails to qualify under one of the seven subsections. Counsel argued that the Appellant had failed to establish that the applicant was not entitled to a licence pursuant to the provisions of Section 6(1) of the Act.

Counsel for the Board confirmed that the position of the Board was that they were satisfied to issue the licence and he did not call any additional evidence. He stated that there was no evidence of any objection at the time the dining lounge licence was granted to the "Quiet Corner Restaurant" and that this was a precedent for the issuance of licences outside the old City of West Toronto. There was no evidence that any other applications for licences had ever been appealed and no evidence that any ratepayers associations within the area were in opposition to the licence. Counsel for the Board argued that there was very little difference between the evidence filed before the Tribunal and the evidence filed originally before the Board and that this would not justify any change in the Decision.

After reviewing the evidence and material filed before it, the Tribunal finds that the Appellant has not established that the applicant is not entitled to a licence pursuant to the provisions of Section 6(1) of the Liquor Licence Act and that, specifically, the Appellant has failed to prove that the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises are located, pursuant to Section 6(1)(g) of the Act. There was no evidence before the



Tribunal as to the effect on the quality of life in the neighbourhood which might be caused by a small licensed restaurant with a maximum of 85 seats. The petition filed on behalf of the Appellant only stated "petition against liquor licence at 534 Annette - Runnymede Village Restaurant". The Tribunal also finds that the 1984 referendum held in the old City of West Toronto area was of little significance in that the referendum was only held in the historically "dry" area and did not include the area to the north in which the proposed licensed premises are located. A licence had already been issued for the "Quiet Corner Restaurant" on the north side of Annette Street and there was no evidence of any opposition to or problems with these licensed premises. There was also evidence of the issuance of a dining lounge licence to the "Wedgewood Restaurant" on Bloor Street west of Jane Street which was virtually on the boundary line, and there was no evidence before the Tribunal as to any objection to that dining lounge licence. There is some indication that the people signing the petition in opposition to the granting of the licence were of the opinion that the premises on the north side of Annette Street were, in fact, located within the "dry" area.

The Tribunal, therefore, dismisses this Appeal and directs the Liquor Licence Board to issue a dining lounge licence to the applicant for the premises at 534 Annette Street in the City of Toronto when all other requirements of the Board have been fulfilled.

CARL McDAID ENTERPRISES LIMITED  
(LICENSEE OF PAV RESTAURANT)

APPEAL FROM A DECISION OF THE LIQUOR LICENCE BOARD

TO ATTACH A TERM AND CONDITION TO THE DINING LOUNGE  
LICENCE AND PATIO LICENCE AND  
TO REFUSE TO ISSUE AN ENTERTAINMENT LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
KENNETH VAN HAMME, MEMBER  
NEIL VOSBURGH, MEMBER

COUNSEL: WILLIAM H. HAMILTON, representing the Appellant  
S. A. GRANNUM, representing the Respondent

DATE OF  
HEARING: 10 April 1985 Orillia

#### REASONS FOR DECISION AND ORDER

This is an appeal by Carl McDaid Enterprises Limited from the Decision of the Liquor Licence Board dated the 12th day of June, 1984, wherein the Board imposed a "Term and Condition" to be attached to the dining lounge and patio (dining lounge) licences issued in respect of the premises known as "Pav Restaurant" situate at 188 Jarvis Street, Orillia, Ontario, and further refused the application for the issuance an an "entertainment lounge" licence with respect to the said premises.

On the 5th day of April, 1984, the Liquor Licence Board issued a Notice of Proposal whereby it proposed to:

- "(a) Refuse to issue an entainment lounge licence to the corporation;
- (b) Suspend for a period of sixty (60) days the dining lounge licence and patio (dining lounge) licence of the corporation;
- (c) Attach a "Term and Condition" to the dining lounge and patio (dining lounge) licences that the sale and service of liquor in the licensed premises shall cease at 10:00 p.m. daily."

The Appellant requested a formal hearing before the Board pursuant to the provisions of Section 11(c) of the Liquor Licence Act and a hearing was held on the 12th day of June, 1984, at which time the Board found that the licensee had carried on activities that were in contravention of the Liquor Licence Act and Regulations and ordered that:

- "(a) There will be a "Term and Condition" attached to the "dining lounge" and "patio" (dining lounge) licences issued in respect of these premises that the sale and service of alcoholic beverages shall cease at 10:00 p.m. daily, the said "Term and Condition" which will take effect on Monday, July 2, 1984, will continue until such time as the licensee corporation submits an application to the Board for its removal, pursuant to Section 9, subsection (2) of the Act when compliance with the regulations has been achieved; and
- "(b) The application for the issuance of an "entertainment lounge" licence in respect of the Pav Restaurant be and is hereby refused.

The appeal is taken from that Decision.

The first witness called on behalf of the Board was George Robinson who had been an inspector with the Liquor Licence Board for 16 years. He advised that an application for an "entertainment lounge" licence had been submitted in December 1982 and that structural changes required in order to qualify for a licence consisted of the removal of a partition. He advised that he had made his inspections and had submitted his reports in November of 1983, at which time it was proposed that the patio licence would be surrendered and the operations closed on Sunday. He stated that he made various calls on the licensed premises during that time. Mr. Robinson testified that he had inspected the premises on Saturday, March 12, 1983 and found that the food/liquor ratio was not being met. He stated that the general housekeeping for the licensed premises was poor, that the main kitchen had not been in operation since 1981. He stated that he had visited the premises as late as April 9, 1985, the date before the commencement of the hearing of this appeal, and that there had been no change in the operations. There was a snack bar which was constructed to serve a takeout service which had been in operation since 1983. The service to the dining lounge was effected through a

"pass through" from the snack bar kitchen and the staff who operated the snack bar also operated the kitchen. Mr. Robinson stated that he had made 14 visits to the premises in 1983 and at least four visits in 1984. He stated that the kitchen was in a deplorable condition in 1983 and that after a visit on August 8 of that year he referred the matter to the Simcoe County Health Unit. He stated that there were beer cases piled in the kitchen, broken glass, a stove covered with rust, and that the refrigerator was in need of repairs. Mr. Robinson stated that there was a menu board in the dining lounge setting out a variety of fast foods such as hamburger and chicken, but that there were no menus and no liquor price menus. He stated that there were four tables in front of the "pass through" from the snack bar kitchen with place mats only and all other tables in the dining lounge were of the lounge type. Mr. Robinson testified that he had seen the food/liquor ratios filed with the Liquor Licence Board for the months of January, 1983 to December, 1983, and that the only two months that came close to achieving the food ratio of 40 per cent were July of 1983 when the total food served represented 35 per cent of total sales and August of 1983 when food sales represented 33 per cent of total sales.

On cross-examination, Mr. Robinson confirmed that an application for an entertainment licence had been made in 1982 and that at Public Hearings before the Liquor Licence Board in Barrie there were no objections to the issuance of an entertainment licence. He also advised that according to a letter from the Licence Officer of the Liquor Licence Board in May of 1983, there was an indication that the Board was prepared to approve the change to an entertainment lounge licence. He stated that no notice was given to the licensee as to when alterations should be completed. The witness also referred to three convictions of the licensee under the provisions of the Liquor Licence Act, one of which was a conviction for the supply of liquor to a person apparently in an intoxicated condition and the other two, permitting liquor sold on the premises to be taken from the licensed premises. The witness stated that he had seen people leaving with beer from the interior lounge and that the deletion of the patio from the licence would, in his opinion, not reduce the possibility of a repeat offence.

The next witness called on behalf of the Board was Stephen Holubko who was an investigator with the Board. He stated that he visited the licensed premises on November 29, 1984 at about 9:30 p.m. and that most of the patrons were in the main dining lounge area with some people near the pool

tables. He stated that there was no food to be seen anywhere in the premises and that he was there for about 40 minutes. He returned on November 30, 1984, at which time he asked for the proprietor and requested the books and records. He was advised that they were not available and he arranged to return on Monday, December 3, 1984, when he examined the books and records to determine the food/liquor ratio. He stated that they were the same figures as reported to the Board. He stated that he was unable to verify them with daily cash register sheets as these were not available.

The only other evidence called on behalf of the Board was the certificates of conviction with respect to the three offences previously referred to which were part of the records filed with the Tribunal.

Carl McDaid, the President of the Licensee, was called as a first witness on behalf of the Appellant. He acknowledged the three convictions which had occurred in January of 1984, but stated that the two convictions with respect to allowing liquor sold on the licensed premises to be taken from the premises dealt with the removal of beer from the patio. In addition, he stated that it was a judgment call on the part of employees of the licensee as to whether or not a person is intoxicated. Much of his evidence dealt with allegations of delay on the part of the Liquor Licence Board with respect to the processing of the application for the entertainment lounge licence and he stated that the alterations requested by the Board were completed by mid-August of 1983. He stated that the snack bar on the premises was used as a normal kitchen and that there were facilities to deep fry chicken and prepare pizzas and steaks. He gave evidence that the equipment was in first class condition but that the grill was rusty because it had not been used. He stated that the ratio records as filed were accurate and he acknowledged that the food for the dining lounge was prepared in the snack bar which he stated was a full kitchen. He stated that the takeout counter was open in July and August of each year, but that during the rest of the year all sales of food were in the lounge area. Mr. McDaid felt that there would be no problem in meeting the 15 per cent ratio required with respect to an entertainment lounge licence if such a licence was issued.

On cross-examination, Mr. McDaid confirmed that he hired a doorman to look after unruly patrons and people coming in under age or perhaps in an intoxicated condition. He was asked why there would be a need for a doorman if this was a bona fide dining lounge. He stated that it was a large area and people, after eating, would stay and enjoy drinking. He stated that in his opinion a waiter or waitress would not know



f a person was intoxicated if he stayed sitting at a table. He stated that new steps had been taken to increase food sales by the installation of a pizza oven and a better exhaust system for the kitchen, and he confirmed that new menu items together with daily specials had been included as an incentive to increase food sales.

Mary Agnes McDaid, the wife of Carl McDaid, was also called as a witness and confirmed that she assisted in the operation of the business and dealt with the steps taken to attempt to increase food sales. On cross-examination, she confirmed that she did the books but that she had not brought the records. She confirmed that an application had been made for an entertainment licence because of the food/liquor ratio problems. She stated that if an entertainment licence was issued, they could have as many as 600 patrons and that they might have to open the old kitchen.

In argument, counsel for the Board reviewed the evidence of the liquor inspector and stated that there had been no contravention of his evidence. He referred to the fact that the dining lounge contained a seating capacity for 207 persons while the patio had a seating capacity for 107 persons. He pointed out that food was served on paper plates and that there was no table service. Patrons were required to pick up their own food from a "pass through" at the snack bar and that Mr. Robinson, the liquor inspector, even questioned the figures that had been filed. He pointed out that when notice of the convictions under the Liquor Licence Act came to the Board's attention they issued the Notice of Proposal and that the Decision of the Board was justified. Counsel argued that in view of the failure to comply with the requirements of the Liquor Licence Act and the regulations an application for the issuance of a new entertainment lounge licence should be refused. He argued that the only change in circumstances since April of 1984 was a change in the ratio figures filed, but that the liquor inspector and the liquor investigator had seen no difference in the quality of the operation even after April of 1984. He submitted that there had been no substantial change in the circumstances that warranted upsetting or reversing the Board's Decision. He argued that the "Term and Condition" should stay in effect until the licensee demonstrated his ability to meet the ratio.

Counsel for the Appellant argued that Section 6 of the Liquor Licence Act granted to an applicant a right to a licence and not a privilege to have a licence issued to him unless one of the seven exceptions as set out in Section 6(1) of the Act was applicable and he submitted that none of these exceptions were applicable. He submitted that the increase in food sales

in 1984 was adequately explained and that it was incongruous that when the Board suggested that the Appellant apply for an entertainment lounge licence they should then use the ratio figures as a reason for refusing that licence.

After reviewing all of the evidence the Tribunal is of the opinion that the Decision of the Liquor Licence Board dated June 12, 1984 should be upheld. The Tribunal finds that the evidence of the ratio figures filed for the period from April of 1984 to December of 1984 indicated that only in four of the nine months in that period was the licensee in compliance with the proper food/liquor ratio as required by the Act. Prior to that there had been no compliance for 15 consecutive months. The evidence of the new ratio was brought out by counsel for the Liquor Licence Board in cross-examination and he stressed the coincidence of the change in the figures at the same time as the date of the issuance of the Notice of Proposal. The Appellant brought forth no supporting evidence such as daily record sheets or tapes. There was also the evidence of the investigator for the Liquor Licence Board that he had requested tapes but was told that the figures in the ledgers could not be verified because there were no daily cash register sheets or tapes. The Tribunal is concerned by the failure of the Appellant to produce evidence to show the daily figures and sales sheets in support of its contention that the ratio was now being met. The evidence also showed that the sale of food was restricted solely through a "pass through" from the snack bar kitchen which was served on paper plates and that there were no proper dining tables set up with tablecloths and cutlery. There was also no evidence before the Tribunal to indicate that the ratio would be complied with on a permanent basis and the Tribunal finds that compliance with the proper food/liquor ratios is still a very serious problem.

The Tribunal also finds that the applicant has not carried on its business in accordance with law as required by Section 6(1)(c)(ii) of the Liquor Licence Act because of its failure to meet the food/liquor ratio and because of the three prior convictions which are indications of the past conduct of the officers or directors of the applicant corporation. The Board was not satisfied with the manner in which the applicant had conducted itself in the operation of the dining lounge licence and there was no evidence before the Tribunal to justify it in reversing that finding.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 12th day of June, 1984, and directs the Board to set the date of commencement of the said "Term and Condition".

SALVATORE VALELA  
(LICENSEE OF VIVA T.O. RESTAURANT)

APPEAL FROM A DECISION AND ORDER OF  
THE LIQUOR LICENCE BOARD

TO ATTACH A TERM AND CONDITION TO THE  
DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
HELEN MORNINGSTAR, MEMBER  
R. CHEMIJ, MEMBER

COUNSEL: S.A. GRANNUM, representing the Respondent

No one appearing for the Appellant

DATE OF  
HEARING: 12 February 1985 Toronto

#### DECISION AND ORDER

Upon reading the record of proceedings before the Board and upon hearing submissions by counsel for the Board, the Tribunal determines as follows:

1. The Appellant was given Appointment For and Notice of Adjourned Hearing the 7th day of February, 1985 as evidenced by Exhibit 4 which contains the Notice that the

"hearing will proceed in accordance with the Appointment for and Notice of Hearing dated the 15th day of May, 1984"

which included the following Notice:

"....if you do not attend at the hearing the Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings.

2. The Appellant has not appeared.

BY VIRTUE OF THE AUTHORITY vested in it under Section 7 of the Statutory Powers Procedure Act and under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 13th day of March, 1984 and directs the Board to set the date of the commencement of the said "Term and Condition".

FIRST FEDERAL FINANCIAL SERVICES operated by  
UPPER CANADA CREDIT CORPORATION

APPEAL FROM THE PROPOSAL OF  
THE REGISTRAR OF MORTGAGE BROKERS

TO REVOKE THE REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN  
F. THOMAS PEOTTO, MEMBER  
ALEXANDER HETTMANN, MEMBER

COUNSEL: MORRIS GILBERT-FRIESNER, President, its Agent  
A.N. MAJAINA, representing the Respondent

DATE OF  
HEARING: 21 March, 1985 Toronto

REASONS FOR DECISION AND ORDER

The Tribunal finds that the Appellant was duly served with the Registrar's Amended Notice and Notice of Further Particulars dated 26 March, 1985.

The Tribunal finds the facts are as set out in the Notice of Proposal and the Amended Notice of Proposal.

The Tribunal further finds that the allegations set out therein have substance and are valid.

Accordingly, by virtue of the authority vested in it under the Mortgage Brokers Act, Section 7, the Tribunal directs the Registrar to carry out his Proposal and Amended Proposal to revoke the registration.

ROBERT L. BARTER

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN  
TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
BARBARA SHAND, MEMBER  
J.T. HOGAN, MEMBER

COUNSEL: STEPHEN AUSTIN, representing the Respondent  
No one appearing for the Appellant

DATE OF  
HEARING: 5 June 1985 Toronto

REASONS FOR DECISION AND ORDER

The Appellant Robert L. Barter applied for registration as a motor vehicle salesperson by means of an application which has been filed herein as Exhibit 3 dated September 15th, 1984, on the standard form and in which he stated, inter alia, that he had a record of criminal convictions and was an undischarged bankrupt.

The Registrar proposed to refuse registration and cited Section 5 of the Motor Vehicle Dealers Act, R.S.O. 1980, as amended.

In his Reasons the Registrar quoted the aforementioned Section 5 of the Act and then went on to provide certain particulars - these had to do with the criminal convictions, as well as the circumstances and particulars of the bankruptcy.

The Appellant appealed to this Tribunal from such Proposal but failed to appear on the day fixed for the hearing of his appeal, notwithstanding that he had been duly and properly served as appears from the Proof of Service filed herein as Exhibit 1.

The Tribunal is of the opinion that the Registrar's Proposal is justified and ought to be upheld.

Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.



PAUL R. BURKE

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN  
TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
BARBARA J. SHAND, MEMBER  
ROSS A. WEMP, MEMBER

COUNSEL: W. GERALD PUNNETT, representing the Appellant  
A. N. MAJAINA, representing the Respondent

DATE OF  
HEARING: 27 June 1985 Guelph

REASONS FOR DECISION AND ORDER

The Appellant, Paul R. Burke, has appealed from a Proposal of the Registrar of Motor Vehicle Dealers to refuse him registration as a motor vehicle salesman. The Registrar relies on Section 5(1)(b) of the Motor Vehicle Dealers Act, R.S.O. 1980, Chapter 299.

Particulars of the Registrar's reasons for his proposal are set out in pages 2, 3, 4 and 5 of that document. Essentially these consist of the alleged fact that in the application for the registration sought, the Appellant made less than full disclosure of his criminal record and also that such criminal record does exist.

The convictions include two for "assault causing bodily harm". Apart from the alleged non-disclosure which we deem a secondary consideration in this case and which need not be the primary basis of our decision, the Tribunal considers that these two convictions as well as the other convictions sufficiently serious to justify the Registrar's Proposal and his concern as to the Appellant's fitness for the registration sought which underlies it. It seems from the evidence led at the hearing that the Appellant's driving licence has been under suspension for most of the past 6 or 7 years and, in particular, during the time he was employed by the motor vehicle dealership which was the proposed employer.

It has been the experience of the Tribunal that where there has been a record of criminal convictions in respect to the past conduct of an applicant for a motor vehicle salesman's registration and where the Registrar of Motor Vehicle Dealers and Salesmen, having reviewed such application and taken exception to such record on the grounds that such convictions are germane to the registration sought and the activities which would thereby be licensed, and where the Tribunal has substituted its opinion for that of the Registrar and reached a conclusion opposite to that achieved by the Registrar, the Divisional Court in exercise of its superior jurisdiction, is prone to restore the decision of the Registrar.

The Divisional Court in its past review of the decisions of this Tribunal has taken a very uncharitable view towards crimes of violence in assessing the fitness of applicants for registration in this industry.

We are bound to share that view which has also been that of the Registrar of Motor Vehicle Dealers.

The evidence in this case has been strong and persuasive and sufficient to convince us that (notwithstanding the absence of any evidence of theft or fraud) on the basis of the decided cases as well as on the merits of this case, the Appeal must fail and the Registrar's decision be upheld.

The Tribunal holds as finding a fact that the past conduct of the Appellant affords reasonable grounds for the belief that if registered he would not carry on business in accordance with law, and with integrity and honesty. And in this respect we make specific reference to his demonstrated disregard for law in many instances and we use the word "honesty" in the sense that it implies the duty of any citizen to obey the law.

We remind the Appellant of the Provisions of Section 8 of the Act, which read:

"A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal and Refuse to Grant Registration to the Appellant as a Motor Vehicle Salesman.

552484 ONTARIO LIMITED operating as  
 MAGNUM AUTO SALES  
 and  
 EDWARD WILLIAM CRAIG

APPEAL FROM A DECISION OF THE  
 REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN  
 TO REVOKE THE REGISTRATIONS

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN  
 F. THOMAS PEOTTO, MEMBER  
 WILLIAM DALGLISH, MEMBER

COUNSEL: ROBERT STANLEY, agent representing the Appellants  
 STEPHEN AUSTIN, representing the Respondent

DATE OF  
 HEARING: 5 December 1984

London

REASONS FOR DECISION AND ORDER

The Appellants 552484 Ontario Limited operating as Magnum Auto Sales, and Edward William Craig, had been registered respectively as a motor vehicle dealer and as a motor vehicle salesman and the purpose of this hearing was to consider their appeal from the Proposal of the Registrar of Motor Vehicle Dealers and Salesmen to revoke such registrations for the reasons set forth in that Proposal which are to be found on page 2 of the same which has been entered as Exhibit 3 to these proceedings and read as follows:

I. In my opinion, the Company's registration should be revoked as the past conduct of its officer and director affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

II. The Company is in breach of a term or condition of its registration;

III. In my opinion, the Registrant's registration [i.e., that of Edward William Craig] should be revoked as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Section 5(1) of the Motor Vehicle Dealers Act reads in part as follows:

An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or
- (c) the applicant is a corporation and,
  - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty.

There were a number of specific allegations of wrongdoing by the Appellants set forth in the Proposal and subsequently referred to and gone into at length in the evidence submitted by the Respondent. Among other things it was alleged that the application for dealership registration made by the Corporate Appellant and signed by Eileen Craig, the wife of Edward William Craig, the other Appellant, contained false and misleading statements which were intended to mislead and deceive the Registrar and/or his staff, which did, in fact mislead and deceive him or them so that the registrations in question were granted when otherwise they would not have been granted. It was alleged that the provisions of Section 3(3) of the Act and that Sections 13(3) and (4), and 18(1) of the Regulations under the Act had been breached and that this constituted grounds for the implementation of the provisions of Section 5 referred to.

Without exhaustively reviewing the evidence in all its detail the Tribunal has unanimously reached the conclusion that the Respondent Registrar has established his case.

And yet the Tribunal is exceedingly reluctant to impose the full severity of the Proposal before it because of a number of factors which it thinks should be taken into consideration in the Appellant's favour.

Firstly, there has been no evidence or, so far as the Tribunal is aware, any suggestion that members of the public were cheated by the Appellants or provided with fraudulently defective or unsatisfactory goods notwithstanding that a substantial number of motor vehicles were sold during the currency of these Registrations.

Secondly, the Appellant Edward William Craig, who appears to have been at all material times the driving force behind the corporate Appellant as well, has a number of features which either were of a redeeming nature or compel the Tribunal's sympathy. That is to say, he has been engaged most of his productive life in the auto industry, either as an auto mechanic or salesman and presumably this is his one and principal vocation or area of competence. He has been housing and supporting an impressive number of dependents, some of who are completing their education as the result of his ability to do this. He is a man who apparently accepts rather than shirk his responsibilities in life, for example, he has bought and paid for his home; he built, established and for 5 years maintained a motor vehicle repair business and when the latter failed shortly before the subject dealership business was begun, he paid off his creditors with the proceeds of the sale of the business instead of going into bankruptcy as so many people seem to do these days in similiar circumstances.

In short, while the Tribunal is unable to reject the Registrar's case, which has been supported by very fulsome evidence, especially in respect to the Application for Registration executed on behalf of the Corporate Registrant, it is not possible to say that Mr. Craig's record in life is totally without integrity and at times it appears that he has demonstrated a lot of integrity.

Therefore, while the Tribunal is unable to order the Registrar to reverse his Proposal, and, on the basis of the law as it stands which also limits the Tribunal's jurisdiction, and pursuant to the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal Orders and Directs



the Registrar to revoke both registrations - but to do so strictly in accordance both with the provisions as well as the spirit and intent of Section 8 of the Motor Vehicle Dealers Act, which reads:

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

Specifically, the Tribunal directs the Registrar to re-register the Appellants immediately and without delay as soon as they have demonstrated that the various objections referred to in evidence at this Hearing have been overcome and including the relocation of the business to suitable premises in compliance with the Sections of the Regulations hereinbefore quoted.

DAVID N. GRANGER AND DONALD K. LEE  
operating as RIDGEWAY AUTO SALES

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE REGISTRATIONS AS  
MOTOR VEHICLE DEALER AND AS MOTOR VEHICLE SALESMEN

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
DR. STUART ROSENBERG, MEMBER  
DAVID BAKER, MEMBER

COUNSEL: STANLEY J. POTTER, representing the Appellant  
STEPHEN AUSTIN, representing the Respondent

DATE OF  
HEARING: 26 August 1985

Toronto

#### REASONS FOR DECISION AND ORDER

The Appellants David N. Granger and Donald K. Lee had formed a partnership styled Ridgeway Auto Sales. Lee and Granger applied individually for registration as motor vehicle salesmen. As partners they also applied on behalf of the partnership Ridgeway Auto Sales for registration as a motor vehicle dealer.

Section 5(1)(b) of the Motor Vehicle Dealers Act, R.S.O. 1980 Chapter 299 provides:

An applicant is entitled to  
registration or renewal of registration  
except where,

(b) the past conduct of the applicant  
affords reasonable grounds for belief  
that he will not carry on business in  
accordance with law and with integrity  
and honesty;

Section 7(1) of the Motor Vehicle Dealers Act provides:

Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, he shall serve notice of his proposal, together with written reasons therefor, on the applicant or registrant.

The Respondent Registrar took exception to these applications and issued a Notice of Proposal which reads at page 3 under the heading "Reasons" as follows:

1. In my opinion Ridgeway is not entitled to registration under Section 5 of the Act as the past conduct of Lee and Granger affords reasonable grounds for belief that they will not carry on business in accordance with law and with integrity and honesty.

2. In my opinion Lee is not entitled to registration under Section 5 of the Act as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

3. In my opinion Granger is not entitled to registration under Section 5 of the Act as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Under the heading of "Particulars" it was further alleged as follows:

1. On or about January 2, 1985, Granger and Lee submitted an Application for Business Registration, dated January 9, 1985, to the Ministry of Consumer and Commercial Relations (the "Ministry") for registration as a motor vehicle dealer c.o.b. under the partnership name of Ridgeway.

2. On or about January 2, 1985, Granger submitted an Application for Employee Registration, dated January 9, 1985, to the Ministry for registration as a motor vehicle salesman.

3. On or about January 2, 1985, Lee submitted an Application for Employee Registration, dated January 9, 1985, to the Ministry for registration as a motor vehicle salesman.

4. Lee and Granger have records of conviction for criminal offences which relate to their fitness for registration under the Act.

5. Lee and Granger furnished false information on their applications for registration and in the application for registration of Ridgeway by failing to disclose that they had criminal records.

6. On the application for registration of Granger, he answered "NO" to Question 7 which states:

Has the applicant ever been convicted under any law of any country, or state, or province thereof, of an offence, or are there any proceedings now pending? If yes, give full particulars of all such convictions and proceedings on separate sheet.

NOTE: Where the applicant has previously been registered, list only those convictions which have occurred since the date of last filing. You are not required to disclose any conviction in respect of which a pardon has been granted.

7. Information subsequently obtained reveal that Granger, in fact, has a record of criminal convictions as follows:

- (i) June 20, 1969 - ATTEMPT ROBBERY, for which he received a suspended sentence and probation for two years.

- (ii) (1) Jan. 21, 1971 ATTEMPT B & E WITH INTENT, for which he was sentenced to incarceration for a period of six months.
- (ii) (2) Jan. 21, 1971 B & E & THEFT (2 charges) for which he was sentenced to a period of incarceration for three months definite and six months indefinite on each charge concurrent but consecutive to count #1.
- (iii) March 29, 1979 - THEFT UNDER \$200 for which he was fined \$200 or a period of incarceration for ten days, in default;
- (iv) January 3, 1980 - THEFT UNDER \$200 for which he was fined \$100 or a period of incarceration for seven days, in default, and probation for six months.

6. On the application for registration of Lee, he answered "NO" to Question 7 which states:

Has the applicant ever been convicted under any law of any country, or state, or province thereof, of an offence, or are there any proceedings now pending? If yes, give full particulars of all such convictions and proceedings on separate sheet.  
NOTE: Where the applicant has previously been registered, list only those convictions which have occurred since the date of last filing. You are not required to disclose any conviction in respect of which a pardon has been granted.

7. Information subsequently obtained revealed that Lee, in fact, has a record of criminal convictions as follows:

- (i) August 1, 1979 - THEFT UNDER \$200 for which he was fined \$150 or a period of incarceration for fifteen days, in default;



- (ii) Jan. 4, 1980 B & E & THEFT (2 charges) for which he was sentenced to a period of incarceration for two days and fined \$250 or a further period of incarceration for two months, in default; B & E & THEFT for which he was sentenced to a period of incarceration of one day and fined \$250 or a further period of incarceration for two months, consecutively, in default; POSSESSION OF STOLEN PROPERTY OVER \$200 for which he was sentenced to a period of incarceration of one day and fined \$250 or a further period of incarceration for two months, consecutively, in default;
- (iii) September 10, 1980 - DANGEROUS DRIVING for which he was fined \$200 or a period of incarceration for thirty days, in default; (2) ASSAULT WITH INTENT TO RESIST ARREST for which he received a suspended sentence and probation for a period of one year;
- (iv) May 4, 1981 - THEFT UNDER \$200 for which he was sentenced to a period of incarceration for one month and probation for a period of one year; (2) THEFT UNDER \$200 (2 charges) for which he was sentenced to a period of incarceration for one month on each charge consecutive and consecutive (sic); (3) THEFT OVER \$200 (3 charges) for which he was sentenced to a period of incarceration of one month on each charge consecutive and consecutive (sic);
- (i) May 5, 1981 - DANGEROUS DRIVING, for which he was sentenced to a period of incarceration of thirty days consecutive to the sentence that was presently being served.

10. On the application for registration, Lee answered "YES" to question 4(b) which states:

Have you ever had a licence or registration of any kind refused, suspended, revoked or cancelled? If yes, give full particulars. NOTE: "Of any kind" includes driver's licence, or any other licence, permit or registration issued by any government body."

The particulars given in response to this question were

IMPAIRED DRIVING MAY 1st, 1980.

11. On the application for registration of Ridgeway, Lee and Granger answered "NO" to question 7, which has already been referred to herein. However, in response to question 3(b) thereof which states:

Have you ever had a licence or registration of any kind refused, suspended, revoked or cancelled? If yes, give full particulars. NOTE: "Of any kind" includes driver's licence, or any other licence, permit or registration issued by any government body."

Lee and Granger responded "YES" with the particulars that

DON LEE DRIVERS LICENCE MAY 1/80 IMPAIRED DRIVING.

12. On or about February 25, 1985, Lee and Granger met with the Registrar in order to discuss the responses given in the applications for registration. At this time, Lee and Granger were unable to provide the Registrar with a satisfactory explanation for failing to disclose their criminal records.

The Tribunal holds that the foregoing is a substantially accurate recital of the facts as proven in evidence before us during the course of this hearing and in particular that negative responses were given in each of the applications where the same required particulars of past criminal convictions of the applicants.

The Tribunal holds that these false answers were quite probably given with the intention of deceiving the Registrar. The Tribunal shares the serious view taken by the Registrar of these false answers and the underlying motive for this which we perceive in common with him. The Tribunal shares the Registrar's conclusion as to the effect of such false answers upon the operation of section 5(1)(b) of the Motor Vehicle Dealers Act. That is to say, the fact that such false answers were given in each case affords reasonable grounds for belief that the applicants will not carry on business in accordance with law and with integrity and honesty if registered.

Furthermore, the offences themselves in respect of which the convictions were entered also afford the grounds for the same belief which the Tribunal shares with the Registrar notwithstanding that some of these convictions were entered when the Appellants were much younger because since, at least in the case of Mr. Granger, there has been a continuing, ongoing succession of convictions right up to 1980. (It may be mentioned parenthetically that in the case of Lee the offences, had they occurred in the aftermath of the Young Offender's Act, might not be before us at all).

The key words in the relative section of the Motor Vehicle Dealer's Act, that is to say section 5 above quoted, are "honesty" and "integrity". Members of the public are entitled to the assurance that salespersons with whom they have been dealing in these very serious transactions (often involving technical and other considerations beyond the scope of their own knowledge and experience) as well as the employers and principals of such salespersons shall be strictly and scrupulously honest.

This is fundamentally important and moreover what the law demands. It is our duty as well as that of the Registrar to enforce that law.

The Tribunal is not convinced having heard this appeal that it should overrule the Registrar having regard to his concerns. Fortunately our society and the economy of our

society offer other opportunities to these Appellants to earn an honest livelihood and to establish and demonstrate a record of honesty and integrity over an appropriate and reasonable period of time such as might satisfy the purpose and intent of Section 8 of the Act which reads:

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

In the meantime the Proposal of the Registrar shall be upheld. Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his proposal and refuse the registrations sought.

DAVID S. LEONARD

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF  
MOTOR VEHICLE DEALERS AND SALESMEN

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN  
BARBARA SHAND, MEMBER  
J. T. HOGAN, MEMBER

COUNSEL: HAROLD MATTSON, representing the Appellant  
STEPHEN AUSTIN, representing the Respondent

DATE OF  
HEARING: 20 March 1985 Toronto

REASONS FOR DECISION AND ORDER

In the application form which is the basis of this hearing, the Applicant did not answer question No. 7 correctly - he failed to disclose that he had been charged with four counts of fraud.

The Tribunal is on record time and again as to the importance of the application being answered correctly, in that the same forms the basis for the exercise by the Registrar of his judgment. Based on its analysis in individual situations, the Tribunal has time and time again upheld the Registrar's position in the Notice of Proposal in these matters. But it does not follow that the incorrect application automatically leads to disentitlement; there is still the exercise of judgment with respect thereto.

The Applicant has given an explanation of the reasons for the incorrect answer; namely, having completed Question No. 4 and not having read Question No. 7 in its entirety, he committed what he calls "an honest, human error". The Tribunal reiterates its position that a grave responsibility lies upon the Applicant to complete the application correctly; the Tribunal, in this instance, accepts the explanation of the Appellant.

Further, the Registrar forthrightly stated that he was influenced by the fact (as is set out in the Notice of Proposal) that the Applicant



"in addition....admitted that he had failed to make any payments to Sonatex Knitting Mills Incorporated, which conduct resulted in the laying of the above-mentioned charges."

The Tribunal is of the opinion that that matter should not (at that point of time) have been taken into consideration by the Registrar. The merits of that matter is yet to be decided.

The Tribunal finds in this instance in respect of the incorrectness of the application form, that such past conduct of the applicant does not afford reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty, and in this regard the Tribunal substitutes its opinion for that of the Registrar.

Accordingly, the Tribunal directs the Registrar to refrain from carrying out his proposal and to grant registration to the Appellant.

This decision is not to be taken as precluding any action which the Registrar may be entitled to take after other proceedings are concluded.

BRIAN F. SUNDERLAND

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF  
MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE THE REGISTRATION AS MOTOR VEHICLE SALESMAN

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
BARBARA SHAND, MEMBER  
PETER BURDON, MEMBER

COUNSEL: BRIAN F. SUNDERLAND, appearing in person  
STEPHEN AUSTIN, representing the Respondent

DATE OF

HEARING: 3 July 1985

Toronto

#### REASONS FOR DECISION AND ORDER

This was an appeal from a decision of the Registrar of the Motor Vehicle Dealers and Salesmen to refuse registration to the Appellant, Brian F. Sunderland, pursuant to his Notice of Proposal which was based on the provisions of section 6(1) and 5(1)(b) of the Motor Vehicle Dealers Act, R.S.O. 1980, Chapter 299 which said sections read in part as follows:

6(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty....

The Notice of Proposal specifies the particulars of the Registrar's concern underlying his proposal to refuse registration. These are to be found at pages 2, 3, and 4 of the Proposal, filed as Exhibit 5, and read in part as follows:

1. The Applicant was previously registered as a motor vehicle salesman under the Act....
2. In his application for registration dated the 13th day of September, 1983, the Applicant furnished false information....
3. The Applicant failed to disclose the following criminal record:
  - (1) March 10, 1969 [when he was aged 17], Take Auto Without Consent, for which he received a suspended sentence of two years probation;
  - (2) July 11, 1974, Possession of a Narcotic contrary to section 3(1) of the Narcotics Control Act, for which he was fined \$35.00 or in default seven days incarceration;
  - (3) January 29, 1980, Dangerous Driving....fined \$250.00...
4. As a result of the false information furnished by the Applicant in the above mentioned application for registration the applicant was registered on or about the 11th day of September, 1983.
5. As a result of the conviction eluded (sic) to in paragraph 8 herein, and the attendant period of incarceration his former employer terminated the employment of the Applicant as a motor vehicle salesman on or about the 27th day of February, 1984 by notification to the Registrar dated the 14th day of March, 1984.
6. On or about the 20th day of November, 1984, the Applicant made a further application for registration as a motor vehicle salesman under the Act. The date of the application for registration was the 30th day of October, 1984.
7. In response to question number 7 contained therein (Have you ever been [criminally] convicted....or are there any proceedings now pending?) the Applicant responded: "Yes"....

8. Contrary to the instructions provided in question 7 of the application of registration, the Applicant failed to give full particulars of all convictions and proceedings on a separate sheet. In fact, on or about the 27th day of February, 1984, the Applicant was convicted of Conspiring to Traffic in Narcotics for which he received incarceration for a period of four years.
9. The Applicant is presently still serving his sentence and is residing in a halfway house in Ottawa, Ontario.
10. In or about the month of December 1984, the Registrar spoke with the Applicant by telephone in order to discuss the above-noted allegations. [The preceding sentence was amended at the hearing.] The Applicant stated as his reason for failing to disclose the details of his criminal record in his application for registration dated the 13th day of September, 1983 that "he didn't want the other staff at the dealership to be aware of his record." The Applicant also acknowledged that the dealer/principal which had employed him as a motor vehicle salesman had a right to be aware of the fact that he had a criminal record and the details thereof.

Charges were pending when the original application, that of September 13, 1983, was made. These related to a very serious conspiracy to traffic in a large quantity of the narcotic cocaine to the value of some \$90,000 and which resulted in the criminal conviction and a sentence of four years imprisonment referred to in paragraph 8, above.

In the opinion of the Tribunal, both the original and current applications were unsatisfactory and the Registrar's concern and his dissatisfaction with them are justified. We agree that an element of deceit and willful intention to deceive was present, certainly in the original application, that dated September 13, 1983. We take a serious view of this. We agree with the Registrar that the past conduct of the Appellant, both in respect to his applications as filed and in respect of the crimes for which he was convicted, affords reasonable grounds for belief that he will not carry on business in accordance with the law, and with integrity and honesty as contemplated by section 5.

However, Mr. Sunderland has a number of positive things operating in his favour. He is still young enough that considerable hope for reform may reasonably be felt. This appears to be the feeling of his present employer as well as that of the parole board and others who have written letters on his behalf and he also has family support.

We feel Mr. Sunderland's present employment as a service advisor in a motor car dealership, which seems to be assured to him for some time in the future, offers an excellent opportunity for him to demonstrate, as time passes, that he has achieved a degree of rehabilitation, possibly sufficient to build up a record of past conduct sufficiently good as to possibly outweigh the negative record of past conduct which has been demonstrated.

The prospect for improvement in Mr. Sunderland's position and for his suitability for consideration for registration at a date somewhere in the future, depending upon the circumstances in which he achieves the expiration of his parole and his employment record in the interim, appears extremely hopeful.

Therefore the provision of section 8, which reads

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed

offers every hope that at a future time a further application for registration may be made by Mr. Sunderland and made with optimism.

Accordingly, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal and refuse registration for the present but subject to the foregoing reasons.



BELPARK HOMES LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT  
TO REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
KENNETH VAN HAMME, MEMBER  
LOUIS A. RICE, MEMBER

APPEARANCES:

STEVEN WESFIELD, representing the Registrar  
under the Ontario New Home Warranties Plan Act

No one appearing for the Applicant

DATE OF

HEARING: 16 December 1985

Toronto

REASONS FOR DECISION AND ORDER

The Registrar's proposal is a proposal to revoke the registration of the Applicant registrant on grounds set out in the Notice of such proposal which read as follows:

REASONS:

1. Pursuant to the provisions of Section 8(2) of the Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350, you have a record of breaches of warranty  
TO WIT:

In the period April 1, 1984 to March 31, 1985, two conciliations were processed on homes sold by you. The conciliation reports confirmed the purchasers' warranty claims, that you had not rectified valid warranty matters although requested to do so.

2. The Program invoiced you for one excessive conciliation, pursuant to Regulation 726, Schedule A-4. You have received the conciliation report, request to perform conciliation fee invoice, but have failed to act.

In the absence of the Applicant registrant who had requested this hearing of his appeal from such proposal and yet failed to appear, although duly served with an Appointment for and Notice of Hearing, the Registrar adduced evidence upon which the Tribunal is persuaded that the Registrar's proposal is based on good and sufficient grounds and ought therefore to be implemented.

The Registrant has demonstrated a willful inclination to disregard his obligations under the Act and under his agreement with the Warranty Program amounting to disdain and this sort of conduct cannot be encouraged.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his proposal.

LUCIANO AND NICOLE CALLEGARI

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN  
BARBARA NICHOLS, MEMBER  
REGINALD MARTIN, MEMBER

COUNSEL: LUCIANO CALLEGARI, appearing in person  
BRIAN W. CHU, representing the Respondent

DATE OF

HEARING: 27 August 1985

Timmins

#### REASONS FOR DECISION AND ORDER

This has been a hearing held in the city of Timmins, Ontario pursuant to section 16 of the Ontario New Home Warranties Plan Act. We have come here to consider a claim brought under section 13 of the Act. The claim has been properly brought in respect of the formal requirements as to notice of claim. However, the Tribunal can only order the relief sought, thereby reversing the decision of the Warranty Program, if it can be demonstrated the appellants' problem is covered by the warranty provided by the Act; that is to say, unless the problems complained of are warranted under the Act. The warranty described is set forth in section 13(1)(a)(i)(ii) and (iii) of the Ontario New Home Warranties Plan Act.

The section goes on in its second subsection to set forth certain exclusions. These exclusions include "normal shrinkage of materials caused by drying after construction" and "damage resulting from improper maintenance".

The problem in this case is one of certain cracks in or around the brick veneer or cladding on the outer surface of the appellants' home. The issue for the Tribunal to decide is whether or not the warranty provided by the Act covers or otherwise applies to such problems.

Essentially, our task is to decide whether the word "normal", which is a word which rather conspicuously appears in section 13(2)(d), has application in this case or not. If the

shrinking is not "normal" it is "abnormal". If it is "abnormal" then it is not excluded from the warranty. Therefore, in trying to decide a case such as the one that is presently before us, the Tribunal must decide if the shrinking has been "normal" or "abnormal".

The Tribunal holds that this is a perfectly proper one year claim brought within one year of the date of possession which was April 24, 1984. There was no problem as to adequacy or sufficiency of notice or in respect to the time factor. The only question to be determined therefore is whether these small cracks in the masonry - hairline cracks - which we are satisfied are due to shrinking caused by drying after construction, are to be considered "abnormal" - i.e., warranted or not. Bearing in mind all the factors which are relevant to our determination as well as the language of the Statute, specifically section 13(2), we are unable to avoid the conclusion that these cracks, distressing as they may be to Mr. and Mrs. Callegari, first time home owners and undoubtedly very proud of their new home and anxious to enjoy it to the full, are nonetheless not to be deemed exceptionable or "abnormal". They are regrettable but they are not, in the opinion of the Tribunal, beyond the contemplated exclusions specifically set out in the Act.

Therefore this claim must fail.

By virtue of the authority vested in it under section 6(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

CARLETON CONDOMINIUM CORPORATION NO. 177

APPEAL FROM THE DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN  
HARRY L. SINGER, MEMBER  
D.H. MACFARLANE, MEMBER

COUNSEL: JAMES A. TACKABERRY, representing the Appellant  
BRIAN CAMPBELL, representing the Respondent

DATE OF

HEARING: 14 November 1984

Toronto

REASONS FOR DECISION AND ORDER

The Appellant's evidence consisted of certain engineer's reports, or professional reports in writing, which tended to demonstrate cracking in foundation walls or, generally, certain defects in respect of which relief pursuant to the provisions of the Ontario New Home Warranty Plan Act might be available to it. But the authors of these reports, documents in writing, were not present nor was any witness called or available at the hearing to be called on behalf of the Appellant.

Counsel for the Appellant was not competent to give evidence nor was that his function.

The Respondent moved for a non-suit on the grounds, inter alia, that the Appellant had failed to make out a prima facie case sufficient to oblige the Respondent to bring evidence in rebuttal. The Respondent said that its witnesses were not present in the hearing room in order to give evidence to prove the case of the Appellant - that was not their function.

With this latter submission the Tribunal is in agreement.

The Tribunal considers that the nub of the issue before it - the issue underlying the Respondent's motion for non-suit - is whether a Respondent, someone against whom



liability in damages is imputed, can be found liable on the basis of documentary opinion evidence in respect of which no opportunity is afforded that person for cross-examination.

It may be that a situation could or might conceivably exist where that was possible. But generally, and in our view in the circumstances of the present case, the principle of natural justice would be offended were we to refuse the respondent's motion and proceed without any cross-examination or without allowing or providing for any cross-examination upon the Appellant's evidence.

In the circumstances, and pursuant to and by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

JOSEPH CIARDULLO

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM.

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
WATSON W. EVANS, MEMBER  
D. H. MACFARLANE, MEMBER

COUNSEL: GLENN R. SOLOMON, representing the Appellant  
BRIAN W. CHU, representing the Respondent

DATE OF

HEARING: 24 July 1985

Toronto

#### REASONS FOR DECISION AND ORDER

The Tribunal has reached a decision in respect to the Motion set before us by counsel for the Appellant.

The principal issue arising from the Motion brought before the Tribunal by counsel for the Appellant is the question of res judicata, that is to say, of whether the Judgement of the Honourable Judge Trotter of the District Court of the Judicial District of York is or is not binding on the Warranty Program by operation of that principle of res judicata or whether, in the alternative, it is not binding upon the Warranty Program because the latter was not a party to the proceedings from which the decision resulted and because the only parties that would be affected by such a judgement would be the parties to the proceedings which resulted in that judgement or otherwise.

In the opinion of the Tribunal the point is one of considerable nicety and it is certainly an important one. We feel that it would be a very good thing if whatever decision were achieved by the Tribunal were subjected to the refining and beneficial process of judicial review. Of course, the Tribunal cannot impose any requirement that its decision be judicially reviewed. It can, however, express the opinion that a judicial review would be of value not only to the public at large but to the Tribunal whenever it may in future be called upon to make a similar decision.

On the basis of the representations which have been made to the Tribunal this morning and upon a review of the materials, scanty as they may be, which have been set before us the Tribunal is of the opinion that the question of the liability of the builder or builders has been settled and determined by the Judgement of the Honourable Judge Trotter. The Tribunal holds that by virtue of that Judgement and by operation of the principle of res judicata the Warranty Program must be deemed (as inheritor of the liability of the builder(s) by operation of law) liable to the Appellant in the amount of \$5,000. which was the amount claimed in the Statement of Claim and allowed in the judgement.

This decision in respect to the Motion set before it is the unanimous decision of the Tribunal.

COURTYARD HOMES LTD

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman as Chairman  
F. THOMAS PEOTTO, Member  
D. H. MACFARLANE, Member

COUNSEL: BRIAN M. CAMPBELL, representing the Respondent  
No one appearing for the Appellant

DATE OF  
HEARING: 21 August 1985 Toronto

# DECISION AND ORDER

The Tribunal determines as follows:

1. The Appellant was sent by registered mail the Appointment for and Notice of Hearing the 23rd day of April, 1985 as evidenced by Exhibit 2, which stated:

....hearing will be held....before the  
Commercial Registration Appeal Tribunal in the  
Tribunal's chambers, 1 St Clair Avenue West,  
Toronto on Wednesday, the 21st day of August,  
1985 at 9:30 o'clock in the forenoon...."

which contains the further notice:

"....if you do not attend at the hearing the  
Commercial Registration Appeal Tribunal may  
proceed in your absence and you will not be  
entitled to any further notice in the  
proceedings."

2. The Appellant has not appeared.

Accordingly, by virtue of the authority vested in it under  
Section 9(4) of the Ontario New Home Warranties Plan Act, the  
Tribunal directs the Registrar to carry out his Proposal.

KATHRYN EDERY

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman as Chairman  
F. THOMAS PEOTTO, Member  
D.H. MACFARLANE, Member

COUNSEL: KATHRYN EDERY, appearing in person

ROBERT HARRISON and  
BRIAN W. CHU, representing the Respondent

DATE OF HEARING: 25 July 1985 Toronto

REASONS FOR DECISION AND ORDER

In the opinion of the Tribunal, the cracks in the basement wall and referred to in evidence are not a major structural defect as defined in Regulations to the Statute nor are those cracks caused by any major structural defect as so defined.

The clay brick on which the steel beam is resting is not a proper support or supporting member such as to comply with the Ontario Building Code. The absence of such a proper provision for the support of this beam constitutes, in the opinion of the Tribunal, a major structural defect. This situation, which the builder has already undertaken to remedy, should be remedied and the Warranty Program should oversee this. It is not unreasonable that the owner Mrs. Edery should be present if she wishes or some person as her representative. The Warranty Program is hereby directed to oversee the proper rectification of the steel beam problem referred to and, within reasonable limits, at a time convenient to both parties, both the owner as well as the builder. The Tribunal also holds that the missing drywall was removed in order to facilitate the inspection of the beam and that the drywall and insulation must also be properly reinstalled, again under the supervision of the Warranty Program.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to rectify or supervise the rectification of the supporting beam pocket, relating to the steel beam referred to in the evidence and to replace dry wall and insulation also referred to in the evidence.



FRANK HODGES

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
HELEN J. MORNINGSTAR, MEMBER  
JOHN C. HURLBURT, MEMBER

COUNSEL: FRANK HODGES, appearing in person  
CAROL STREET, representing the Respondent

DATE OF HEARING: 17 September 1985 Toronto

REASONS FOR DECISION AND ORDER

This was a claim in respect of certain cracks in the Appellant's basement wall. At times substantial quantities of water entered the basement making the basement impossible to use for its normal purposes which included use as play space for a young child. However, there was no evidence that the house as a whole was uninhabitable. Precedent, by which the Tribunal governs itself, requires the house in its entirety, not just in part, to be uninhabitable (i.e., unfit for the purpose for which it was intended) in order for a claim brought beyond the first year, a claim for a major structural defect defined, to succeed.

Similarly the other criteria for a major structural defect which are defined in the Regulations to the Statute are not met either.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MARMION BUILDING CORPORATION  
 AND  
 TRI-M CONSTRUCTION

APPEAL FROM A DECISION OF THE REGISTRAR UNDER THE  
 ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATIONS

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
 HELEN J. MORNINGSTAR, MEMBER  
 D.H. MACFARLANE, MEMBER

COUNSEL: BRIAN M. CAMPBELL, representing the Respondent  
 No one appearing for the Appellant

DATE OF HEARING: 19 November 1984 Toronto

REASONS FOR DECISION AND ORDER

The Respondent's Proposals were (Exhibit 9A) to revoke the registration of Marmion Building Corporation and (Exhibit 9B) to revoke that of Tri-M Construction Ltd., in each case pursuant to Section 8(2) of the Ontario New Home Warranties Plan Act which reads as follows:

Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if he were an applicant, or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration.

Section 7 referred to above reads in relevant part as follows:

7.-(1) An applicant is entitled to registration by the Registrar except where,

(c) the applicant is a corporation and,

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty;...

The principal or sole officer, director and shareholder of both the Appellant Corporations was an individual named Morris Rosen. It is Morris Rosen with whom we are primarily concerned in this decision rather than any corporate cloaks in which he may appear from time to time now or in the future. Thus, in this decision, the words "Appellants" or "Appellant" really relate to Morris Rosen, the living and controlling entity behind the corporate inventions through which he operated and this should be borne in mind for the sake of clarity.

Mr. Rosen, in the exercise of his right to appeal the Proposals, requested this Hearing. The Respondent accordingly prepared a really quite vast volume of evidence, mostly contracts entered into by Rosen's companies or correspondence between himself or his solicitors and others, with which he would have been probably more familiar than anyone else, and as well the Respondent subpoenaed a large number of witnesses who also appeared, no doubt at considerable inconvenience, at the start of the Hearing; but Mr. Rosen did not appear. Instead the Appellants were represented by counsel, Mr. Adrian Hill, who appeared to have not been adequately briefed although he had been on the record as solicitor for the Appellant for some months previously. Mr. Hill submitted that he was not familiar with the facts of the case (to which the Respondent's documentary evidence related) and requested an adjournment to enable him to prepare. He also spoke of the limitation or insufficiency of his retainer or its terms and stated that he was instructed to walk out if no adjournment were granted. He had been retained to seek an adjournment and no more. In view of the large number of witnesses gathered and the non-attendance of Rosen himself, his motion or request was denied by the unanimous decision of the Tribunal. Mr. Hill then withdrew. As the Respondent's evidence proceeded the Tribunal's view was confirmed that the refusal of the requested adjournment had been entirely proper.

The Hearing proceeded. It seems that the Appellants (in all or most instances "Marmion Construction carrying on business as Tri-M Homes, Markham Village") entered into 22 contracts being standard Agreements of Purchase and Sale for the provision of new houses with 22 individuals or pairs of individuals. (The majority of these purchasers appear to have been young couples buying homes for the first time.) Construction of the houses had not been started when any of the contracts were signed (nor indeed were they ever started) but in each case a date was fixed for completion and delivery of possession and in each case (with one exception) a deposit of \$10,000 was made by the purchasers to a total of \$210,000.

Each of the Agreements of Purchase and Sale (at paragraph 3(a)) made provision for reasonable extensions of the closing date provided there was no wilful or unreasonable neglect on the part of the vendor. (Emphasis added)

The closing dates designated in each of the contracts came and went. In each case the vendor exercised his privilege to extend the date for closing. The first unilateral extension (in most or all the cases) was to August 30th, 1983. (There had been an extension by agreement in some cases prior to this.) This was followed by a further unilateral extension to December 29th, 1983 and finally from that date to June 29th, 1984. These announcements of extension of the dates fixed for closing were made by letter addressed to the purchasers or their conveyancing solicitors and offered very little information or explanation and no option. Here are some typical examples (See Exhibit 19, Tabs 5, 19 and 13):

(TAB 5)

GOLDMAN, SPRING  
Barristers and Solicitors

June 7, 1983

Sheldon L. Sherman  
Barrister & Solicitor  
Suite 1  
2645 Eglinton Ave. E.  
Scarborough, Ontario  
M1K 2S2

Dear Mr. Sherman:

Re: Tri-M Homes  
Sale to West

We are the solicitors for the vendor in the above-noted transaction.

This is to inform you that due to construction delays and pursuant to paragraph 3(a) of the Agreement of Purchase and Sale, the closing date in this transaction is hereby extended to August 30, 1983.

Yours very truly,

GOLDMAN, SPRING

"S. Kichler"  
Steven A. Kichler

TAB 9)

GOLDMAN, SPRING  
Barristers and Solicitors

August 10, 1983

Sheldon L. Sherman  
Barrister & Solicitor  
Suite 1  
2645 Eglinton Ave. E.  
Scarborough, Ontario  
M1K 2S2

Dear Mr. Sherman:

Re: Tri-M Homes  
Sale to West

This letter is to inform you that the closing date in this transaction is being extended to December 29, 1983 for the following reason.

The Vendor is currently encountering problems between itself and the subdivider from whom it has purchased the subject property and consequently the Vendor is presently involved in litigation with the subdivider in order to resolve the matter.

Therefore for reasons beyond its control, the Vendor is exercising its right to extend the closing date pursuant to paragraph 3(a) of the Agreement of Purchase and Sale.

Yours very truly,

GOLDMAN, SPRING

"S. Kichler"  
Steven A. Kichler



(TAB 13)

MARMION BUILDING CORPORATION  
103 DENISON STREET, UNIT NO. 3, MARKHAM, ONTARIO L3R 1B5

December 1, 1983

Sheldon L. Sherman, Barrister  
Suite 1  
2645 Eglinton Ave. E.  
Scarborough, Ontario

Dear Sir:

Re: Tri-M Homes, Markham Village  
Sale to West

This letter is to inform you that the closing date in this transaction is being extended to June 29, 1984 for the following reason.

Marmion Building Corporation is currently encountering problems between itself and the subdivider from whom it has purchased the subject property and consequently Marmion Building Corporation as Vendor is presently involved in litigation with the subdivider in order to resolve the matter. The subdivider is presently in receivership and is being represented by the Clarkson Company in behalf of the Bank of Commerce.

Therefore for reasons beyond our control, Marmion Building Corporation as Vendor is exercising its right to extend the closing date pursuant to paragraph 3(a) of the Agreement of Purchase and Sale.

Yours Truly,

Moe Rosen  
President

Resulting from these extensions and the failure of the vendor to provide the new homes contracted for, dislocation and inconvenience to the purchasers occurred on a grand scale. Some who were previous homeowners had sold and been obliged to vacate their previous homes and were living with parents or in-laws often in very stressful circumstances. At least one couple's lives were further complicated, we were told, in the midst of this by pregnancy.

The following extracts of letters speak for themselves by way of illustration:

(Exhibit 14, Tab 2: Extract)

Re: Cheung purchase from Tri-M Homes  
Sawyer Crescent Markham, Ontario

. . .

With respect to the above-noted transaction and with respect to the telephone conversations we have had with your office, would you kindly advise us whether or not this transaction will close on the 30th of April, 1982. Please be advised that our client now works in Toronto but currently resides in London, Ontario. He therefore desires to complete the transaction as soon as possible because of the great inconvenience occasioned (sic) to him by having to commute from London to Toronto on a daily basis.

. . .

You are hereby put on notice that undo extensions create serious hardship for our client and if he is expected to enjure (sic) these then the least that he is entitled to is reasonable explanations from your client.

Yours very truly,

KAN, MARK & POON

Per:

J. LESTER DAVIES

(Exhibit 17, Tab 4: Extract)

August 17, 1983

Without Prejudice

Mr. Moe Rosen  
c/o Trim-M Homes  
Unit 3  
103 Denison Street  
Markham, Ontario  
L3R 1B5

Dear Mr. Rosen:

Re: Property: 23 Sawyer Crescent, Markham, Ontario

...my lawyer advised me today that he received a letter from your lawyer stating that the closing date on the home I contracted to buy from you (23 Sawyer Crescent, Markham) on February 21, 1983, has been pushed forward again, this time to December 29, 1983.

This is unacceptable!

Let's review the facts:

1. The home was purchased on February 21, 1983, closing date of July 15, 1983. 23 Sawyer Crescent, Markham.
2. I sold my home at 97 Reginald Crescent, Markham, based on this agreement and moved out July 15, 1983.
3. In early July, you asked for and received an extension to August 30, 1983, at which time Mr. Moad advised that is the final extension or you pay my costs of moving, storage, etc.
4. We never received a reply from you.

. . . . .

7. In June/July, I was still given the impression by you and Tom Brethour that the start date was imminent and August 30th still held.

8. I rented a home short term in Caledon East until September 6, 1983, and put my furniture in storage.
9. ...My three children start school in Markham in early September. The rental situation is impossible.

. . . . .

11. My costs to-date are getting out of hand, not to mention the unbelievable inconvenience and strain put on my family as a result of your actions.
12. You still haven't even started construction.
13. I calculate that this "deal" has so far cost me the following:

a) Interest lost on down payment	400
b) Sale of home on Reginald Crescent would bring \$10,000 more in today's market than in February 1983.	10,000
c) Moving expenses that wouldn't have been incurred if the home was ready July 15, 1983	1,500
d) Rent to-date	1,000
e) Government Grant now lost	3,000
f) Increased lawyer fees	<u>1,000</u>
[Total]	<u>16,900</u>

(Exhibit 20, Tab 3: Extract)

"I have moved out of my previous home since June 18/83 and am now living in a temporary residence."

The above letters merely offer a taste of the general situation inflicted on these purchasers.

Many of the purchasers were first time homeowners and would have been entitled to federal or provincial grants or loans which they lost by reason of the delay. In short, the inconvenience, loss of time and money, stress and suffering experienced by these purchasers was extreme.

The vendor (i.e., Mr. Rosen's Appellant corporation[s]) advanced certain reasons for the delays in closings, such as an aforementioned carpenters' strike, inability on the vendor's part to close with its vendor (the vendor having executed the aforementioned Agreements of Purchase and Sale had apparently not acquired title to the lands to be built upon, and was indulging in a law suit with the person(s) or corporation(s) from whom he was purchasing which, judging from the testimony we heard, was being conducted at a very low level indeed; that, however, is irrelevant to our present purposes) and the vendor also cited lack of co-operation from the municipality, the Town of Markham, in respect to the issuance of building permits. However the Respondent called among its witnesses a Mr. Joseph Thomas Silver who is an official of the Building and Zoning branch of the municipal government of the Town of Markham. His evidence which we deem indisputable, was that building permits had been issued for the buildings which were the subject of the purchase agreements in question which were ready to be picked up. His evidence was that, far from doing so, the vendor requested and was paid a refund of the building permit fees he had paid (or the refundable portion thereof, amounting to some \$2,948.00).

For example, the building permit in respect to the home contracted to be sold to Frank and Cynthia Vittorio had already been cancelled and the fee refunded to the vendor when the vendor wrote the following letter to their solicitor:

(Exhibit 16, Tab 11: Extract)

Re: Tri-M HOMES, MARKHAM VILLAGE  
SALE TO: Vittorio

This letter is to inform you that the closing date in this transaction is being extended to June 29, 1984 for the following reason.

Marmion Building Corporation is currently encountering problems between itself and the subdivider from whom it has purchased the subject

property and consequently Marmion Building Corporation as Vendor is presently involved in litigation with the subdivider in order to resolve the matter. The subdivider is presently in receivership and is being represented by the Clarkson Company in behalf of the Bank of Commerce.

Therefore for reasons beyond our control, the Marmion Building Corporation is exercising its right to extend the closing date pursuant to paragraph 3(a) of the Agreement of Purchase and Sale.

Yours Truly,

Moe Rosen  
President

That letter did not bespeak the truth of the situation. It left out the truth. What it should have said was "I have cancelled your building permit. I am not, therefore, intending to build your home". It might have gone on to say "My real reason for extending matters, delaying bringing things to a head by telling you the truth, is that I wish to keep your \$10,000 until June 29th, 1984 or even longer if I can". It will be noted that the letter was signed by Mr. Rosen and the Tribunal is clearly satisfied that it was entirely his work and that he was aware of the enormous untruthfulness of it. The Tribunal is satisfied that this is but one example of many disclosed in the record of this hearing of Rosen's dishonesty within the meaning and contemplation of the aforesaid Section 7(1)(c)(ii) of the Act.

The letter of June 7th, 1983 over the signature of Rosen's (the Appellants') solicitor Mr. Kichler as quoted above on page 4 (Exhibit 19, Tab 5) states that "the closing of the transaction is hereby extended to August 30th, 1983....due to construction delays..." At that point in time June 7th, 1983, the vendor had neither title to the land nor, in fact, his building permit. In the Tribunal's opinion that failure to inform the purchaser of the true reason for delay was a piece of misrepresentation amounting to dishonesty. The Tribunal attributes such dishonesty to Morris Rosen and holds that it constitutes dishonesty of the sort referred to in Section 7(1)(c)(ii) of the Act. Moreover, the Tribunal holds that the record of Mr. Rosen's misconduct as disclosed in evidence at this hearing abounds in ample and sufficient examples of his



dishonesty, lack of integrity and failure to carry out his or his companies' undertakings in accordance with law fully sufficient to justify the Proposals appealed from and the upholding by the Tribunal of those Proposals.

The whole gist and manner of Mr. Rosen's conduct as disclosed in evidence before us was false and untruthful. This was aggravated in our perception by a most distasteful failure by him to return telephone calls, to talk to the purchasers in their grievous distress or generally to treat them with simple and common decency. By failing to refund them their deposit money, he deprived them of the use of it and in our view dishonestly converted the same, and certainly the interest on it, to his own use. In the terms and specific language of the Statute, the Tribunal unanimously holds that the past conduct of Morris Rosen while he was an officer and director of both Marmion Building Corporation and Tri-M Construction affords reasonable grounds for belief that his undertakings or those of any corporation of which he may be an officer or director (now or in future) will not be carried on in accordance with law and with integrity and honesty.

The Tribunal notes that the Warranty Program has paid some \$210,000 from the Compensation Fund established under the terms of the Act to the disappointed home purchasers in this case and that the same remains unpaid by the vendor and outstanding at this time. The purchasers having received their indemnification from the fund, have transferred and conveyed their rights of action against the vendor(s) to the Respondent.

The Tribunal also notes the provisions of Section 8(2) which reads in part as follows:

Subject to Section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration...or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts...

The Tribunal holds that the Registrar is entitled to the remedy sought by him on this ground as well.

Approximately 10 of the purchasers or prospective new homeowners remained ready, willing and able to close their transactions right down to the time when the Warranty Program

repaid them their \$10,000 deposits from the Compensation Fund. Others of the purchasers, a majority of them, eventually instructed their lawyers to write requesting the return of their deposits after the aggravations imposed upon them by the vendor had become intolerable - a point reached at various different times depending on the varying tolerance levels of these various individuals. Invariably, such a request for the return of purchase money was answered by a letter from Mr. Rosen in the following vein:

(Exhibit 21, Tab 6)

Dear Sir:

Re: Purchaser MITCHELL  
Lot No. 7A Plan M1900(65R-4218)

We are in receipt of your letter in respect to the above Purchaser and understand that you are solicitors for the same. We are treating your rescission of the agreement of purchase and sale between the purchaser and Marmion Building Corporation as an anticipatory breach of the contract between the parties.

You are hereby notified as per the Agreement of Purchase and Sale between the Purchaser and Marmion Building Corporation that Marmion Building Corporation, as Vendor is declaring this transaction at an end and is hereby retaining the deposit on the above lot as damages for breach of contract between the parties without derogation from any other rights which Marmion Building Corporation may have.

Yours Truly,

Moe Rosen  
President

We think this letter and the more or less identical letters which were sent to other purchasers who attempted to get their money back when it became clear to them that it was most unlikely that the vendor had any intention of constructing a new home or conveying the same to them amply illustrates the harsh and predatory quality of the individual at whose mercy these unfortunate purchasers found themselves. In the view of

the Tribunal neither consumers nor the Compensation Fund administered by the Warranty Program should ever be exposed to the risk of further or future injury by this individual.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to forthwith revoke the registration of the Appellants Marmion Building Corporation and Tri-M Construction.

The Tribunal further advises that this revocation shall be permanent and as well that neither Mr. Rosen nor any company wholly or partially under the control of Mr. Rosen receive registration under this Act.

MICHAEL LLOYD McPHEE

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., Chairman  
HELEN J. MORNINGSTAR, Member  
D.H. MACFARLANE, Member

COUNSEL: MICHAEL McPHEE, appearing in person  
BRIAN W. CHU, representing the Respondent

DATE OF  
HEARING: 8 August 1985 Toronto

#### REASONS FOR DECISION AND ORDER

The Tribunal finds that there is a crack in the east foundation wall of the home. This crack is located under the basement stairs on the east wall at approximately fourteen feet from the rear south wall. The crack varies from hairline at the basement floor to approximately 1/16th of an inch admitting the insertion of a business card at a spot where it meets the masonry on the exterior. The crack permits water penetration causing stains on the wall and stains on the floor, and (according to the Appellant) does not permit the finishing of the basement in that area.

Since the claim was made beyond one year, in order to succeed the appellant must demonstrate that his claim is based upon the existence of a major structural defect as defined in the Regulations.

Upon the evidence before it, the Tribunal finds:

There has been no failure of any load-bearing portion of the building, nor has its load-bearing function been materially and adversely affected.

The crack does not come within the inclusion expressed within the regulation major cracks in basement walls; the crack is hairline plus, the fact that water seeps through to the degree described does not indicate a major crack.

The dampness and, since the water presence is of a degree that it can be so described, comes within the exclusion expressed within the regulation for it is not that arising from a failure of a load-bearing portion of the building. Such a failure has not been found by the Tribunal. The Appellant has made an argument and has extrapolated the definition of failure to be that of failure to prevent the seepage in of water. The Tribunal does not agree. The failure must be related to load-bearing function and the Tribunal has found no such failure.

The Tribunal finds that the seepage of water through the crack is not such as to materially and adversely affect the use of the building for the purpose for which it was intended. The area purchased was unfinished. The use has been, and will continue to be that of normal residential occupancy of a home. It may not meet with the plans of the Appellant, but a claim must come within the provisions as stated in order to be valid.

Reference was made by the Appellant to the presence of electrical home equipment and its juxtaposition with the water. The Tribunal is of the opinion that such does not render the home uninhabitable, or prevent the building from being used for the purpose for which it is was intended, or materially and adversely affect such use.

The Tribunal finds that the condition of the basement wall by virtue of the crack described before the Tribunal, was not that of a major structural defect within the meaning of the term of this particular warranty.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MR. AND MRS. JOSIP MUNCIC

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT.

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C. VICE-CHAIRMAN as CHAIRMAN  
HELEN J. MORNINGSTAR, MEMBER  
LOUIS A. RICE, MEMBER

COUNSEL: MARK GROSSMAN, representing the Appellant  
BRIAN CHU, representing the Respondent

DATE OF  
HEARING: 29 April 1985 Toronto

REASONS FOR DECISION AND ORDER

The point of issue in this case is an interesting and important one. We are glad to have had the opportunity to determine and to put into the record of decided cases our decision upon the point in order that the same may serve some useful purpose for the future.

Subsections (3) and (4) of Section 13 of the Ontario New Home Warranties Plan Act read as follows:

(3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for his possession and the warranties take effect from the date specified in the certificate.

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.



The Agreed Statement of Fact discloses:

1. The builder, Anniversary Homes, enrolled the home on March 28, 1983 located on Lot 29 of Plan 1515 in the Municipality of Waterloo, known municipally as 7 Oswego Court, Kitchener.
2. Mr. & Mrs. Josip Muncic ("the Muncics") purchased the home and took possession of the same in June of 1983.
3. The builder, Anniversary Homes, failed to deliver to the owner a "Certificate of Completion and Possession".
4. The Ontario New Home Warranty Program first received written notice of the Muncics' claim by letter dated July 19th 1984.
5. The alleged defects arose within one year of possession.
6. The parties agree that if written notice had been given to the Warranty Program within the first year, four of five defects would have been covered under the first year warranties.

The nub of the problem, of course, is that the builder failed to deliver the necessary Certificate of Completion and Possession. The Appellant's argument was that, in view of this, the warranty period never began and therefore never ended. But this the Tribunal rejects. The statute is specific as to when the warranty begins - its begins on the date of the delivery of possession or, if you like, on the date of completion and possession. (The word "completion" apparently referring to the completion of construction rather than completion of the conveyance.) However, the certificate, which the builder or vendor is under a mandatory obligation to deliver, is merely the best evidence of the date in question, but where lacking is not the only possible evidence of that fact which is a fact of historical record.

The warranty protection conferred by the Act is conferred by the Legislature and was not found at common law. The rights thus given are limited qualitatively, quantitatively and temporally. In the latter regard they are limited to the first year (or in certain cases to the first five years) - not the first year following the delivery of the certificate, but the first year following the event which the certificate is meant to certify or evince. Failure by the vendor to deliver the certificate does not alter this.

In the case of Re: Webb (1982) C.R.A.T. Summaries of Decisions, Vol. 11, p.125, a decision of this Tribunal released on March 29, 1982, it was held (reading from the fourth paragraph from the end of that decision):

"The law is a matter of public notice, ignorance of the law is of no avail. Failure by the builder to file the Certificate of Completion and Possession in this case did not alter the fact that the Claimant took possession in October 1977 and that the 1 year warranty lapsed one year thereafter and that no claim pursuant to it would be valid unless communicated to the Warranty Program in writing as provided by Reg. 4(1) as aforesaid."

The same principle applies in this case.

Accordingly by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranty Plan Act the Tribunal directs the New Home Warranty Program to disallow this claim.

MR. AND MRS. LOUIS NATALE

APPEAL FROM TWO DECISIONS OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIMS

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman as Chairman  
HELEN J. MORNINGSTAR, Member  
D.H. MACFARLANE, Member

COUNSEL: LOUIS NATALE, appearing in person  
ROBERT HARRISON, representing the Respondent

DATE OF  
HEARING: 10 July 1985

#### REASONS FOR DECISION AND ORDER

The cracks in the basement and other walls as mentioned in the first Proof of Claim entered as Exhibit Number 9 do not in the Tribunal's opinion constitute a major structural defect as defined in the Regulations, that is to say, they do not, provided proper maintenance is provided which is the homeowner's responsibility, present an imminent threat of the collapse of the building, nor do they render the home uninhabitable.

The same conclusions have been reached by the Tribunal in respect to the problems set out in the second Proof of Claim which has been entered as Exhibit Number 10.

The Tribunal has felt some reservations concerning the fireplace but upon earnest consideration of the evidence before it, the Tribunal is unable to conclude that any major structural defect as defined exists here either. Therefore, unfortunately, these appeals fail.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow claim number one and to disallow claim number two.

G.H. PERKINS CONSTRUCTION LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER  
THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
HELEN J. MORNINGSTAR MEMBER  
WILLIAM WATSON, MEMBER

APPEARANCES:

MURRAY R. YOUNG, counsel for the Applicant

BRIAN M. CAMPBELL, representing the Registrar  
under the Ontario New Home Warranties Plan Act

DATES OF 15, 16 April 1985

HEARING: 8, 9 October 1985

Ottawa

#### REASONS FOR DECISION AND ORDER

This hearing was held on April 15th and 16th and continued on October 8th and 9th, 1985 pursuant to section 9 of the Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350 (hereinafter referred to as the Act) before the Commercial Registration Appeal Tribunal sitting at Ottawa, Ontario, Mary Jane Binks Rice, Q.C., Vice-Chairman as Chairman, Helen J. Morningstar and William Watson as Members, in the presence of Murray Young, counsel for the applicant, and Brian M. Campbell, counsel for the Respondent.

The applicant had requested a hearing, after receiving a Notice of Proposal dated July 20, 1984, (Tab 50 of the Respondent's documents filed in its entirety as Exhibit 6) under Section 9 of the Act, from the Respondent revoking its registration under the Plan for the following reasons:

" Pursuant to the provisions of Section 9 of the Ontario New Home Warranties Plan Act, 1976, the Registrar hereby gives notice of his proposal to REVOKE your registration under the plan for the reasons shown below:

1. You have a record of breaches of warranties within the meaning of subsection 2 of section 8 of the Ontario New Home Warranties Plan Act, 1976, TO  
WIT:

(A) You have failed to comply with conciliation decisions rendered by the Warranty Program October 13, 1983 and February 23, 1984 in respect of premises owned by Mr. Gordon William Dowser pursuant to an agreement between this owner and G.H. Perkins Construction Ltd. dated April 7, 1983 in respect of Part Lot 37, Plan 911, Township of Osgoode, municipally known as Part Lot 37, Dow Street, Metcalfe.

(B) Specifically, you have failed to comply with some 7 items found to be warranty items by the Warranty Program in respect of the aforesaid premises and reflected in the aforesaid conciliation decisions which work was subsequently contracted out to a subcontractor by the Warranty Program, completed by the subcontractor, and paid for by the Program.

(C) You have failed to respond to letters dated August 25, 1982, October 4, 1982, December 1, 1983 and March 5, 1984 in which the Warranty Program advised that the provisions of the Conciliation decisions be complied with by you and which were not so complied with.

2. In the alternative and pursuant to the provisions of subsection 2 of section 8 of the Ontario New Home Warranties Plan Act, 1976, you have committed breaches of terms and conditions of registration: TO WIT:

(A) In failing to comply with the conciliation decisions and the requests of the Warranty Program to so comply you have contravened subsection 3 of By-Law R-2 in that as a registrant you have failed to diligently perform or caused to be performed all obligations imposed on you under the Plan and under any agreement (being the Vendor/Builder Agreement signed by you April 18, 1978 made by you with the corporation in respect of the Plan); "

The Respondent introduced evidence as to the vendor/builder agreement between the Ontario New Home Warranty Program and G.H. Perkins Construction Ltd. of April 18, 1978 and the contract executed between the applicant and Gordon William Dowser establishing the applicability of the Act and the Tribunal's jurisdiction. The Respondent also introduced letters from Mr. Dowser to the New Home Warranty Program of August 18, 1983, and September 23, 1983 as well as correspondence from the Program to the applicant of August 25, 1983 and October 4, 1983, which in essence set out the initial complaints. The evidence introduced indicates that the Program responded to the complaints by preparing a conciliation report on October 13, 1983. The applicant and the Dowses were both in attendance for this inspection. On October 17, 1983, the conciliation report was mailed out to the Dowses and the applicant, the latter who was given thirty days to remedy the complaints. Without getting into all the details of the specific construction problems, the complaints and respective recommendations for corrections were as follows:

- (I) The Contractor to remedy the weeping bed of septic system which was leaking to the surface, by taking the action recommended by the Department of the Ministry of Environment, i.e. to execute any compliance order issued by the Ministry of Environment.
- (II) The Contractor to rectify the floor joist of the rear bedroom floor to level that floor.
- (III) The Contractor to install doubled joists beneath the closet walls to level the floor in the front bedroom.
- (IV) The Contractor to finish the mouldings around the windows and doors.
- (V) The Contractor to rectify the crack in the fireplace.
- (VI) The Contractor to finish the caulking of the tiles in the bedroom.
- (VII) The Contractor to remedy water leakage into the basement at well pipes.



- (VIII) The Contractor to finish the area under the living room window.
- (IX) The Contractor to seal the well pipe connections where they penetrate the front foundation.
- (X) The Contractor to fortify supports at the basement stair location.

Upon receipt of the conciliation report, the applicant did perform some of the repairs requested, in particular, the matters set out in (II), (III), (V), (VI), (VII), and (VIII). A further inspection and conciliation report at which the applicant was not present, which indicated that the above items (II), (III), (V), (VI), (VII), and (VIII) had been performed, was prepared on February 23, 1984 and sent out on February 28, 1984. The specific matters to be repaired are as follows:

- (A) The Contractor should attach wood moulding to the back of the kitchen counter area.
- (B) The Contractor should duct the bathroom fan directly to the exterior, properly insulate it and repaint the stained ceiling.
- (C) The Contractor should seal the foundation at the exterior where the well pipes connect - this repair had been previously recommended as Item (IX) above conciliation report October 13, 1983.
- (D) The Contractor to complete supports to beams at basement stair location - this repair had been previously recommended as Item (X) in the previous conciliation report.

It was further observed that the weeping bed systems had been completed by a contractor hired by the Program and the owners had not reported any further malfunction. Mr. Perkins had not taken any steps to rectify within the specified period. The subsequent conciliation report was forwarded to the applicant to rectify those matters set out within thirty days. As in the previous report, the sanction to the registered contractor is that if the repairs are not made

within that period, the Program will have the work done and invoice the contractor. A further work schedule on April 13, 1984 was prepared by the Program which, to a large extent, dealt with matters considered in the February conciliation report. The Program arranged for the work to be performed and invoiced the applicant.

As previously stated, the position of the Program is that the applicant failed to remedy several items set out in the two conciliation reports referred to, that all these items were in the nature of work the applicant had contracted to perform, that all these items were warranted and that the Program was compelled to pay other contractors to perform these repairs. As the Applicant would not repay the Program for the total amount it had expended, the applicant's registration should be revoked.

The most costly item is the septic system. The applicant failed to comply with the request of the first conciliation report and the Program had the work performed and rendered a total invoice for the tile bed work for \$6,031.75 (which included an administration cost of fifteen percent) see Tabs 24, 26, 40 and 45 of Exhibit 6.

The applicant took the position that the contract dated April 7, 1983 provides in paragraph 1 that the house would be constructed according to the plans and specifications attached to the contract. Paragraph 13 of the contract provides "sewage disposal: health unit requirements: Extra fill if needed supplied by owner". As the system was designed by the Ministry of Environment and the certificate of approval was issued on April 6, 1983, it was not the responsibility of the applicant to supply another septic tank, more tile or labour for the appropriate and new design. The system was installed in accordance with the specifications in the certificate of approval and a certificate of use was issued following final inspection. The applicant has argued that the reason for the failure was the original design and not the installation by G.H. Perkins Construction Ltd.

Counsel for the Program has, with respect to the question of the repair to the septic system referred to two previous decisions of the Tribunal: (1) Decision and Order of the Commercial Registration Appeal Tribunal signed by Matthew Sheard, Q.C., Vice-Chairman, regarding a hearing held on October 26, 1979 with respect to Ernest L. Harper Limited as applicant and the Registrar under the Ontario New Home Warranties Plan Act as Respondent; (2) Decision and Order of

the Commercial Registration Appeal Tribunal signed by John Yaremko, Q.C., Chairman regarding a hearing held on November 20, 1979, and February 6, 1980, with respect to M.E. Ethier Construction Limited as applicant and the Registrar under the Ontario New Home Warranties Plan Act as Respondent. Both decisions deal with fact situations remarkably similar to those presently before the Tribunal. The Tribunal has found these decisions helpful but, of course, the decision of the Tribunal is based on the very facts before it. In the case involving Ernest L. Harper Limited the Tribunal stated as follows:

"Responsibility for it rests with the person in charge, and, in a house construction project, that person is the builder. He is responsible both to the new homeowner and to the Warranty Program during the full period of the warranty. He may have a separate claim over against the sub-contractor, or even, in some hypothetical case, against an inspector if he can prove, say, gross negligence, wilful intent to defraud or some malicious intent to do damage or injury to him which is recognizable under law; but any such case would be a matter between the builder and the party or parties who had done injury to the builder, and the place to settle it would be in the court of proper competence and jurisdiction in the course of an action brought by the builder, but not within the context of the relationships he has with the Corporation or the new homeowner, which are clearly encompassed by the Contract of Purchase and Sale and the Vendor/Builder Agreement."

Mr. Dowser, the owner, who is and was occupying a warranted home, on which the builder's one year warranty had not expired, had declared the total failure of the septic system leaching bed. The condition was confirmed by the Program and the Department of the Environment. The owner was entitled, under the conditions of the Ontario New Home Warranties Plan Act, to have such failure of the system rectified either by the builder, who was responsible for the installation of the system, or by the Warranty Program in the event the builder could not or would not perform the repairs. The Tribunal is, therefore, of the opinion that the Applicant must pay the sum of \$6,031.75.

As to the other items set out in the Work Schedule of April 13, 1984, the Tribunal is of the following opinion:

Item 1, A through D, were not on the original conciliation report, or certificate of completion, and were probably caused by wood shrinkage and are not warrantable.

Item 2, A, B - These items are part of the plumbing contract and are the responsibility of the owner.

Item 3 - The evidence discloses that it was repaired by the applicant.

Item 4, A - This item would have been repaired by the Window Manufacturer at no charge and, therefore, we are of the opinion that the applicant should not be responsible.

Item 4, B - This item was installed by the owner and, therefore, the item is not warrantable.

Item 4, C - In his evidence, the applicant indicates that he accepts responsibility and, therefore, \$52 plus 15% is payable by him.

The Tribunal rejects imposing responsibility on the applicant for those items set out in the invoice marked Tab 45 of Exhibit 6. As the bathroom vent is surely part of the electrical system, it is the responsibility of the owner and not the applicant. The Tribunal is of the opinion that there should be no further financial responsibility for the tile work in addition to the sum of \$6,031.75.

G.H. Perkins Construction Ltd. has an unblemished record with the Program. The principals of this Company impressed the Tribunal as very honest, hardworking and responsible people. The Tribunal has found that the applicant is responsible for the septic system. Responsibility and fault are, however, two very distinct concepts. The fault for the original design or the genesis of the problem does not, in our opinion, lie with the applicant. It is not our duty to comment on what legal recourse or third party actions lie open to the applicant. It is clear, however, that the applicant as general contractor is ultimately responsible. The Tribunal has seriously scrutinized the possibility of reducing the charge of the new septic system. The fact remains that during the period that the applicant, the subcontractor, the Ministry of the

Environment were all expending time as to whose responsibility the leakage was, it was obligatory upon the Program to have the work repaired which it did and for which it paid. If the cost appears high to the applicant, which it may well be, it bears some responsibility as the applicant surely had ample opportunity to possibly perform the repairs at a lower cost, before the Program was obliged to act.

Accordingly and by virtue of the authority vested in it under section 9(4) of the Ontario New Home Home Warranties Plan Act, the Registrar by this Order is directed to carry out the proposal to revoke the applicant's registration under the Plan unless before the 14th day of June, 1986, the applicant shall have reimbursed the Program the sum of \$6,091.55.

PAUL HENRY RENNICK

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
HELEN J. MORNINGSTAR, MEMBER  
LOUIS A. RICE, MEMBER

COUNSEL: RONALD KOVACS, representing the Appellant  
BRIAN W. CHU, representing the Respondent

DATES OF  
HEARING: 22 and 31 May 1985 Toronto

#### REASONS FOR DECISION AND ORDER

The vast majority of "new homes" constructed in Ontario and warranted under the Ontario New Home Warranties Plan Act, R.S.O. 1980, are conveyed by a builder or developer through a transaction of purchase and sale by which the "new homeowners" receive both the completed house as well as the land on which it stands, all at the same time and by means of the same transaction. But it is also possible to become a "new homeowner" as contemplated by the Act by means of contracting with the builder for the construction of a home on lands already owned by the "new homeowner". Such was the situation in this case.

Mr. Paul Henry Rennick, the Appellant herein, who was a forester by profession, was the owner of a substantial piece of land in Burlington, at the foot of the escarpment there. He contracted with Mr. White, a builder, to construct a house for him upon this land of his and took occupation of the house when it was finished in 1984. When the first Spring came in April 1985 it was discovered that the septic system was not functioning correctly in that effluent was ponding atop the tile bed and bursting through the berm or bank at one end of the said bed and generally malfunctioning. Mr. Rennick sought rectification of this problem under the warranty provided by the Act for new homes.



In the Tribunal's opinion the home built by Mr. White for Mr. Rennick does fall within the scope of the protection which the statute is meant to provide and, by reason of paragraph 25 of the Construction Contract, which calls for the construction of a septic system in accordance with local Health Unit standards and requirements, we deem the septic system, including the septic tank and tile bed, to be within that scope as well.

But that does not dispose of the matter. In this case the lands on which the house and its appurtenant tile bed and septic system were built belonged at all material times, i.e. before, during and after construction, to the owner, Mr. Rennick, who was accustomed to exercising the prerogatives of ownership of such lands and in fact did so at all material times and did so fairly freely at his own discretion. The reciprocal of this was that Mr. White, the builder, was not in control of the whole of the subject lands at any time.

Situated, as stated, at the foot of an escarpment, these lands at certain seasons received, as could only be expected, water run-off. The site of the tile bed for the septic system was selected by and with the approval of the local Health Unit but, as the latter's representative and Inspector, Mr. Hart, stated in his evidence, it was by no means an ideal situation for such a bed, to start with, because it was located in a kind of hollow.

The Health Unit's Certificate of Approval (upon which the Building Permit was contingent) was conditional upon certain terms and conditions which were endorsed on the back of it. Thus it was incumbent on the builder to construct both in conformity with his contract with the owner and as well (amounting to the same thing) in conformity with the conditions of the Conditional Certificate given by the Health Unit.

The Appellant argued that one or more of the Health Unit's conditions had been breached (i.e., not complied with improperly or incompletely met) and that, in particular, a bar (or berm) at one end of the field (adjacent to a gully) which was meant to be 15 feet thick was constructed of less than that thickness. Also it was alleged that the swales or small ditches intended to carry off surface water were not deep enough and that the surface of the field was not shaped so as to adequately shed water.

It would appear that in a case where a builder was liable in damages to a homeowner for a breach of the Construction Contract (in respect to items warranted under the Act) the protection of the Warranty Program would be available to the homeowner. But the latter would have to prove such damages. And having done so, that these were damages consequent upon the builder's breach of contract and not from some other cause for which the builder was not responsible, such as things done by persons over whom he had no control.

In this case Mr. Greenfield, a consulting engineer and impressive expert witness has given evidence which, in the context of the evidence as a whole, has persuaded the Tribunal that Mr. White, the builder, regardless of any failure by his sub-contractor to build the septic system to the very letter of the conditions or specifications referred to, was not the author of the prime causal factors leading to the damage or injury complained of which were causes outside the scope of his control and therefore of his responsibility or, thereby, that of the Warranty Program.

In its Decision in the case of Nina and Paul Campbell released in 1983 and reported at 12 CRAT (1983) 116, it was said at p.117:

Moreover such a claim as this could only succeed if the causal fault were in no way imputable to the claimant.

In the Tribunal's opinion the prime causal factors in Mr. Rennick's problem consist of the topography of his lands, especially those which lie above and to the east of the tile bed; topography which leads to the shedding of surface water or run-off (especially in the wet seasons) upon the surface of the tile bed and which adverse topography is the result at least in part of certain landscaping operations effected by the Appellant himself and over which the builder had no control.

The Appellant's contribution to the overall damage or injury sustained by him also included failure by him to place or plant grass or grass sod over the bed to encourage what is called evapo-transpiration of the bed (i.e., a very usual method of using the roots and leaves of grass in conjunction with the passing currents of dry air to extract unwanted moisture from the soil) as well as his decision to roto-till the bed (to plant a garden of corn) which produced depressions in the surface that became puddles to aggravate the overall wetness.

The Tribunal sympathizes with the Appellant but it is not fair to penalize a builder or anyone else for a fault for which it has not been shown that he is primarily responsible, especially where the penalty which he would ultimately be expected to pay was going to be paid over to the benefit of the person who was responsible, in whole or in part, for such fault.

Accordingly the appeal fails and by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

## ROCCO D'AGOSTINO HOMES LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
KENNETH VAN HAMME, MEMBER  
D.H. MACFARLANE, MEMBER

COUNSEL: ROCCO D'AGOSTINO, its agent

CAROL STREET, representing the Respondent

DATE OF

HEARING: 20 March 1985

North Bay

REASONS FOR DECISION AND ORDER

The Tribunal finds that in this case there was a major structural defect contrary to the Ontario Building Code and that it was a defect requiring to be repaired.

The Tribunal finds that the Appellant was given a reasonable opportunity to repair it and that the Appellant failed to do so and that the Respondent thus had no alternative but to undertake to have the work done by alternative means and that the Respondent (and/or the Corporation he represents) properly did so.)

The Tribunal finds that the cost of such work plus administrative expenses which were charged to the Appellant in the total sum of \$4,002.00 were unavoidable and properly charged to the Appellant and that the Appellant has failed to pay them. The Tribunal finds that the allegations set out in the Notice of Proposal have been proven. The Tribunal notes that the Appellant Corporation and Mr. D'Agostino appear to have built a large number of homes and we would hope that the Warranty Program's outlay will be recovered from the Appellant and that the Appellant will be able to return to or remain in the industry.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs that the Registrar of the Ontario New Home Warranty Home Program revoke the registration of the Appellant unless within three weeks of the date of this Order the full sum of \$4,002.00 is paid to the Warranty Program or to the Respondent by the Appellant.

## ROYAL TRUST CORPORATION OF CANADA

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
HARRY L. SINGER, MEMBER  
D.H. MACFARLANE, MEMBER

COUNSEL: BARBARA J. PUCKERING, representing the Appellant  
PATRICIA HENNESSY, representing the Respondent

DATE OF

HEARING: 12 July 1984

Toronto

REASONS FOR DECISION AND ORDER

The Appellant, Royal Trust Corporation of Canada, appeals from a Decision of the New Home Warranty Program (hereinafter referred to as the Program) disallowing a claim for damages.

Prior to the commencement of counsels' argument, Ms. Hennessy and Ms. Puckering filed an Agreed Statement of Facts as between Royal Trust and the Warranty Program. A review of this Statement indicated the following facts to the Tribunal:

1. On or about May 29, 1981 Antonio Fernando Coutinho and Sara Selva Coutinho purchased a home at 27 Harlton Crescent, in the City of Toronto, in the Province of Ontario from European Homes Limited.
2. The purchase was partly financed by a mortgage in the sum of \$79,403.00 in favour of Royal Trust Corporation from the Coutinhos which was registered against the property on the day of closing.
3. On or about June 23, 1981 the Coutinhos gave notice to the Program of serious problems with the construction of the home including foundation problems.
4. On or about May 15, 1982 the Coutinhos defaulted on the mortgage from Royal Trust and vacated the home.

5. On or about July 23, 1982 Royal Trust issued a power of sale.
6. On or about July 28, 1982 an action was commenced in the Supreme Court of Ontario between the homeowners and the Warranty Program, European Homes (the builder), Royal Trust Corporation (the mortgagee), the Borough of York, Ministry of Consumer and Commercial Relations (since discontinued) and Halberstadt, Weisman (solicitors). The Plaintiff's claim was for damages inter alia for a faultily constructed home. Discoveries had been set down for the last week in August, 1984.
7. On or about September 5, 1982, the Power of Sale expired and Royal Trust went into possession of the property.
8. On or about the 13th day of June, 1983, the property was transferred by Power of Sale from Royal Trust to Frank Zerucelli for a purchase price of \$43,500.00.
9. On or about March 4, 1983 Royal Trust filed a Proof of Claim with the Warranty Program claiming compensation for defective workmanship and a major structural defect. In support of the Proof of Claim, Royal Trust provided the Warranty Program with a statement of account.
10. The Program conceded that a major structural defect existed at the subject property but denied the entitlement of Royal Trust to any benefit or payment.

The question posed to the Tribunal is whether or not Royal Trust, given the foregoing facts, is an owner as defined by the Act and consequently whether or not Royal Trust is entitled to receive any benefits or payments from the Guarantee Fund. The present hearing and consequent decision is not concerned with the quantum of damages.

What is the nature of a mortgage? Is a mortgagee in possession for purposes of Power of Sale proceedings a successor in title to an owner and therefore an owner as defined in section 1(g) of the Ontario New Home Warranties Plan Act? At common law, the granting of a mortgage by a mortgagor to a mortgagee, resulted in a conveyance of the legal title in



the land from the mortgagor to the mortgagee, and a mortgagor who defaulted on the last payment due under the mortgage would lose the right to have legal title to the property reconveyed to him and would also lose all money paid under the mortgage. As a result of this unfairness, the courts of equity developed a doctrine which provided that a mortgagor in default had an equitable right to redeem the property, which became known as the equity of redemption. Title therefore can refer to legal or equitable title.

Counsel for the Program strongly urged the Tribunal to consider the person who is entitled to the equity of redemption to be the actual owner of the land, arguing that the equity of redemption has always been considered as an estate in the land and the interest in the land must be somewhere and cannot be in abeyance but it is not in the mortgagee and therefore must remain in the mortgagor. Counsel further submitted that a mortgagee carrying out Power of Sale proceedings does not acquire the equity of redemption. By the Power of Sale, which was a contractual power and is now a statutory, the mortgagee may sell and convey the equity of redemption. The mortgagee's interest, however, counsel for the Program argued, should not be characterized as an interest in land. Ms. Hennessy on behalf of the Program took the position that a mortgage is properly characterized as mere security for the loan between the mortgagor and the mortgagee.

On behalf of Royal Trust, it was submitted that the definition of "owner" in the Act anticipates that at the same time there can be more than one owner. The Coutinhos were owners as they had first acquired the home for occupancy and all their successors in title are considered owners. In order to be entitled to compensation under the Act, the owner must suffer damage. Unless a mortgage is in default and the mortgagee has gone into possession, the mortgagee would not have borne any loss as a result of a major structural defect. It must also be remembered that once a mortgagee is in possession, then he has a duty to account to the mortgagor and account for the proper management of the property.

It was strongly urged on behalf of counsel for Royal Trust that title does not merely refer to legal title alone but "owner" as defined includes those who first acquire the home and their successors in title. Further it was pointed out that to determine successors in title one simply goes to the Record or abstract of Title. Exhibit 6 filed clearly indicates the initial grant of European Homes Limited to the Coutinhos as Instrument No. 680562. Then as Instrument No. 680563 the grant from the Coutinhos to Royal Trust is shown. If the Coutinhos had not gone into default and sold the property to Mr. Zerucelli, the grant would have been from the Coutinhos to Mr. Zerucelli and Royal Trust would not have been a successor in

title. However, the abstract clearly shows the grant is from Royal Trust to Mr. Zerucelli and the chain of title clearly demonstrates Royal Trust to be a successor in title. Counsel argued that to arbitrarily divide title into equitable and legal, and mutually exclude one from the other, leads to absurdity in interpretation for if an "owner" means only legal title, then subsequent owners who mortgage their property would not be included and if title means equitable title alone, it would mean that owners who place second and subsequent mortgages upon their property thereby transferring their equitable title, have no status to make a claim. Counsel strongly urged that the fact that there may be more than one owner at the same time as well as several owners over a period of time as defined by the Act, simply means that the Program has to decide if as the "owner", the claimant has suffered any damages as a result of a major structural defect. In looking at the Act, section 1(g) defines owner in the following manner: "'owner' means a person who first acquires a home from its vendor for occupancy, and his successors in title."

The Tribunal is of the opinion that each claim should be considered on its merits and if a major structural defect is proved and damage has resulted, then it is the intent of the legislation to protect all persons who first acquire the home for occupancy and all successors in title. Surely a mortgagee in possession who has suffered damage as a result of a major structural defect and is a successor in title is an owner as defined by the Legislation. We feel that no unfairness results from this consequence. Royal Trust has suffered a direct loss as a result of the major structural defect in the building which decreased its resale value. The corporation is not using the New Home Warranties Plan as additional "insurance coverage" because of the obligation of the mortgagee in possession to account to the Coutinhos.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claim and permit the damages claimed by Royal Trust Corporation of Canada to be ascertained. \*

\* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Ontario New Home Warranty Program. The appeal was subsequently abandoned.

PATRICK W. SALDANHA

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
HARRY L. SINGER, MEMBER  
STEPHEN PUSTIL, MEMBER

COUNSEL: PATRICK W. SALDANHA, appearing on his own behalf  
CAROL STREET, representing the Respondent

DATES OF 28 June and 11 December 1984  
HEARING: 17 September 1985

Toronto

REASONS FOR DECISION AND ORDER

Upon a review of the evidence, this appeal, at least substantially, must fail because for the most part the element of the Appellant's claim were not matters which were warranted under the Ontario New Home Warranties Plan Act.

To the extent that the Tribunal does have the ability to find that the warranty operates, it accepts the proposal made by counsel on behalf of the Warranty Program and awards the amount suggested by her, that is to say, \$80.00 plus one-half of \$357.00 for the water staining and lack of insulation, plus the sum of \$240.00 for the redecorating which was necessitated by water staining.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claim in part, to wit, in the amount of \$498.00.

HYMAN SHAPIRO

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
STEPHEN JARVIS, MEMBER  
D.H. MacFARLANE, MEMBER

COUNSEL: HYMAN SHAPIRO, appearing in person

CAROL STREET, representing the Respondent

DATE OF  
HEARING: 25 September 1985

Toronto

#### REASONS FOR DECISION AND ORDER

The problem set before us was that water was coming in beneath the French doors located on the second floor of the Appellant's home and penetrating through the floor and down from the ceiling into the living room/dining room. This problem occurred at very infrequent intervals.

It was incumbent upon the Appellant, in order to succeed in his appeal from the Warranty Program's decision, to demonstrate either a failure in the load-bearing portion of the home, a failure in the load-bearing function of such, or the existence of some material and adverse effect upon the use of the building which, of course, was residential occupancy. The last mentioned definition of major structural defect requires, as we have held in the past, that the whole building, not just part of it, be affected; that the habitability of the whole house should be compromised. We do not find that in this case the habitability of the house has been so compromised. Nor do we find that a safety hazard in respect of the wiring has been established. It appears that an occupancy permit was issued at the time that the house was completed and it appears that a proper inspection of the electrical circuits in the house must have been made in order for such occupancy permit to have been granted and therefore that the electrical wiring in the house at that time was properly grounded to ensure the safety of it. We have had no evidence set before us that that grounding has been altered.

We do not find that the house is in imminent danger of collapse which would be the case if the load-bearing portions of it were in a state of failure, nor do we find that any part of the load-bearing portions of the house are in a state of failure such as to threaten imminent collapse.

On the whole, having heard and assessed the evidence which has been set before us, we are unable to find sufficient grounds to permit us to reverse the Warranty Program's decision.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

ANDREW J. SIMAN

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM.

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
HELEN J. MORNINGSTAR, MEMBER  
WILLIAM WATSON, MEMBER

COUNSEL: BRIAN W. CHU, representing the Respondent

No one appearing for the Appellant

DATE OF  
HEARING: 18 April 1985

Ottawa

#### DECISION AND ORDER

The Tribunal determines as follows:

1. The Appellant was given notice of the Appointment for Hearing the 25th day of March, 1985 as evidenced by Exhibit 2 which contains the further Notice:

"....if you do not attend at the hearing the Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings."

2. The Appellant has not appeared.
3. No evidence has been placed before the Tribunal in respect of the claim.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.



## YORK CONDOMINIUM CORPORATION #462

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
DR. STUART E. ROSENBERG, MEMBER  
LOUIS A. RICE, MEMBER

COUNSEL: GORDON WOOLNOUGH, its agent

BRIAN M. CAMPBELL, representing the Respondent

DATE OF

HEARING: 29 July 1985

Toronto

REASONS FOR DECISION AND ORDER

This was a claim under the Ontario New Home Warrantie Plan Act, R.S.O. 1980 Chapter 350 and its Regulations, brought by the Condominium Corporation in respect to alleged major structural defects in certain of the common elements in a multiple occupancy rental structure registered under the Condominium Act and it was a twofold claim being, firstly, cracking brick veneer on the west wall of the building and secondly, in respect of certain interior walls referred to in evidence which the Tribunal concludes are concrete block partitions dividing units from the common elements, viz., the common garage from the individual unit garages.

It was incumbent upon the Appellant to demonstrate a major structural defect as defined because the claim had been brought after the one year warranty described in Section 13(1) of the Act, which is a fairly broad warranty and a generous one, had lapsed through the passage of time.

A "major structural defect" for the purposes of the Act and all purposes relevant to this hearing is defined at Ontario Regulation 726, Part I, section 1(o)(i) and (ii).

In our opinion the cracking of the brick veneer referred to, no matter how unsightly from the aesthetic point of view and regardless of how the defect might have been considered by this Tribunal had the claim been a first year claim, does not meet the requirements of "major structural

defect" set forth above in the definition quoted. We hold that veneer is not a "load-bearing member" and has no "load-bearing function" which therefore has not failed and could not fail. Nor has the cracking complained of adversely affected the use of the building, which use, as the Tribunal has invariably held in the past, in cases of residential structures is residential occupancy in the normal course. This claim therefore fails.

Upon its review of the evidence and of what was said in argument, the Tribunal holds that the interior walls whose condition was the subject of the second branch of the Appellant's claim were partition walls and similarly not load-bearing. Their condition in the Tribunal's opinion is the result of certain sagging in the poured concrete floors which said sagging, on the evidence, we deem to have now stabilized. Neither the cracks complained of in such wall or walls nor the distortion of certain door or door frames or any other problems having the same source such as were included in the claim and referred to in evidence were sufficient to render the building materially and adversely affected in its use which, as stated, is residential occupancy in the normal course.

We have concluded in passing, that the sagging floor, a defect but not a major structural defect as we find it, was due to a design fault on the part of the structural engineer rather than any defect in either materials or construction of the building so that, although we need not determine the point, it is no doubt moot whether the complaint would fall under section 13(1)(a)(i) in any event.

This appeal was adroitly presented and the expert evidence now set before us was impressive. Notwithstanding that we regret that it must be dismissed for the reasons stated.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

YORK CONDOMINIUM CORPORATION #528

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
HELEN J. MORNINGSTAR, MEMBER  
D.H. MACFARLANE, MEMBER

COUNSEL: JOHN HAHN, representing Appellant  
BRIAN M. CAMPBELL AND BRIAN W. CHU,  
representing the Respondent

DATES OF  
HEARING: 10, 11, 12, 13, 14, 19, 20 June 1985 Toronto

REASONS FOR DECISION AND ORDER

The Tribunal has reviewed with care the evidence and arguments set before it during the course of the lengthy seven day hearing. It has studied, as well, the law. It has expended much time and many pains in its deliberations over the Appellant's claims and it regrets that, in the end, it has been unable to achieve a unanimous decision. What follows, therefore, are two sets of Reasons for Decision, the Majority Decision which is to be implemented forthwith upon the release of these Reasons, and a Dissenting Decision which is to be implemented only insofar as any elements of it may correspond with the Decision of the majority.

MAJORITY DECISION

The following is the decision of panelists Matthew Sheard, Q.C., Vice-Chairman and D.H. MacFarlane, Member:

The Appellant was a Condominium Corporation styled York Condominium Corporation No. 528 and the building with which it is and has at all material times been connected is a multiple dwelling structure containing some 40 units and known municipally as No. 30 Glen Elm Avenue in the City of Toronto.

This building was designed and erected by and on behalf of a developer, High City Holdings Limited, on lands owned by it which subsequently devolved in accordance with the provisions of the Condominium Act upon the Appellant and the various unit holders. The developer, who for the purposes of the Ontario New Home Warranties Plan Act may also and preferably be referred to as the vendor, is no longer present or available to answer for its misdeeds, failures and inadequacies herein or those of its employees or subcontractors for which it would otherwise be answerable. The Appellant claims that the Respondent, under and by virtue of the warranty provided by the Ontario New Home Warranties Plan Act, is therefore answerable and responsible for these in the place and stead of High City Holdings Limited.

This is true, but only in so far as that statute creates liability on the part of the Respondent or in so far as any other law or principle of law may operate to do so. And the function of the Tribunal is to apply the law to the facts of the case as proven, primarily the Ontario New Home Warranties Plan Act but as well any other statute or legal principle of determining relevance. It is neither the function of the Tribunal nor within the scope of its jurisdiction to make any order which exceeds or varies the provisions of the relevant law as it bears upon the facts as proven in evidence and, to the contrary, any order or determination relating to this or any other issue made by this Tribunal which was not in accordance with the provisions of the relevant governing law would be in error.

It is because of these constraints upon our decision-making capability that what may be considered the bulk of the Appellant's claim before us at this hearing must fail. This is not to say that a court of law or some other tribunal sitting somewhere else and having broader powers than this one might not reach a decision in favour of the Appellant and other possible or prospective claimants in this case, either in

damages or some other relief, as against the vendor and/or its sub-contractors, the architects and/or structural engineers involved, the municipal building inspectors in respect of their performance or lack of performance, and/or even against the Respondent itself, its employees or agents on the basis of some cause or causes of action beyond the mere scope and provisions of the Ontario New Home Warranties Plan Act which, in this case, is basically all this Tribunal is empowered to take into consideration.

We feel free and confident to state at the outset that this building was extremely shoddily constructed in many ways and we can make that a finding of fact for whatever it is worth. For example, the manner in which the vapour barriers were installed (or not installed) in the walls of the building was, in a word, disgraceful. The fact that this appalling shoddiness was approved in the periodical inspection reports both by the architects and the municipal inspectors is very hard to view with other than the gravest misgivings as to either the competence or integrity of such functionaries in the discharge of their duties - duties owed to parties whom we deem to have been injured or who will in the future be injured, namely, present and ultimate owners and occupants of the units and common elements of 30 Glen Elm Avenue. As well, the fact that water has entered and may in the future enter many of the units causing expense, inconvenience, and loss of property value to the owners and the occupants and their successors (as well as the condominium corporation itself in respect to any common element affected) is deplorable as are the stains and marks of efflorescence and other deficiencies referred to in evidence, particularly in the highly impressive expert presentation of Mr. Tony Alexander, P. Eng. who was called on behalf of the Appellant and which must surely rank as one of the most informative and persuasive of its type preserved in the Tribunal's annals.

And yet, as indicated, and with regret, it is our opinion that the bulk of the Appellant's case must fail.

This claim, or group of claims, like any other claim upon the warranty provided by this legislation and the Guarantee Fund which underlies it, in order to succeed must satisfy the conditions precedent set out in the Act. Quite simply, except for "major structural defects", as defined, which the present deficiencies are not alleged to be, a valid claim, before it can even begin to be considered upon its merits, must be communicated to the Warranty Program in writing within the one year period during which, (and not beyond which



the warranty exists. And it must be communicated with sufficient clarity and particularity that the Warranty Program may have a fair ability to know roughly what its nature is and roughly where it is located.

If this simple, logical and eminently fair requirement of the statute which provides the warranty is not met within the time delimited, then the warranty, like Cinderella's coach and horses, disappears upon the stroke of midnight leaving the unfortunate homeowner bereft of its wondrous dispensation, and alone in the harsh, hard world (the real world) with only those remedies remaining to him or her which would have existed if the warranty had never come into being in the first place.

The evidence discloses that there are 40-odd units in the condominium building and 40-odd unit holders as well as the condominium corporation itself which owns the common elements. Of these, a certain small number of unit holders, notably, Janet Stubbs of unit number 213, Mr. Nathanielsz of unit 202 and (apparently) Mr. Lambie of unit number 303, got in on time. By which we mean they communicated a claim in writing to the Warranty Program stating, in each case, roughly what the problem was and where it was to be found and they did this before the warranty expired. Also, the condominium corporation got its claim in on time in respect, specifically, of the efflorescence on certain exterior cracks of the masonry. The Warranty Program fixed these problems and, in the case of the three unit holders, they stayed fixed. In the case of the problems of the Appellant, i.e. the Condominium Corporation, those problems just referred to have not. In our view, therefore, they must be fixed again.

But as to all the other unit holders, a still undetermined number of persons who did not file their claims as aforesaid, i.e., in the way specifically provided for in the Act, for them the lights went out - the lights went out and the warranty expired - at the stroke of midnight one year after it came into effect. Like Cinderella they were left with nothing. It was in disregard of that basic fact that the case on their behalf, in all its panoply of detail, was set before us throughout seven days of testimony and argument. (And be it noted, as well, that none of the other unit holders were named as parties to these proceedings.)

We must now consider the nature, meaning and value of the case submitted or said to have been submitted on behalf of these remaining unit holders, allegedly rising from or consequent upon certain vapour barriers, water penetration or



balcony-related problems, having to do with cavity or non-cavity walls, alleged poor workmanship, and so forth. It appears that often, and in each case, (except for the three unit holders who got claims in on time and had their problems fixed, as stated) after the warranty had expired, the subject of complaints was also the subject of certain correspondence emanating from the Warranty Program during the period June 30 to December, 1982 over the signatures of Mr. Dade of the Warranty Program's Operation Department or Mr. Robert Maling, Manager of the Warranty Program's Condominium Section. Extracts from these (exhibits 24, 25, 26 and 40) read as follows:

June 30, 1982

(Exhibit 24)

High City Holdings Ltd.  
5300 Yonge Street  
Willowdale, Ontario

Attention: Mr. Wurman

Re York Condominium Corporation No. 528  
30 Glen Elm Road, Toronto, Ontario.

Dear Mr. Wurman:

Once again the people of this condominium are experiencing water problems in their suites from areas that would appear to be associated with the balconies above. These complaints date back to February of 1981 and fall within the builder's first year warranty period, so it is incumbent upon your firm to perform such work as is necessary to avoid further water problems.

. . .

Take notice then that should you not initiate work on these matters within fourteen (14) days and proceed in an expeditious manner, the New Home Warranty Program will assume the responsibility of your warranty. In the event of our having to perform this work on your behalf, the cost of such work, including any administrative costs (and interest where applicable) will be invoiced to you.

Failure to honour such invoices would result in our taking whatever legal action that is available to us.

. . .

Yours truly,

"Ray Dade"  
Mr. Ray Dade,  
Conciliator.

September 24, 1982

(Exhibit 25)

High City Holdings Ltd.  
5300 Yonge Street  
Willowdale, Ontario

Attention: Mr. Wurman

Re York Condominium Corporation No. 528  
30 Glen Elm Road, Toronto

Dear Sir:

On September 16, 1982 an investigation was made by Construction Control Ltd., in regards to the water problems being experienced by the residents of the above condominium.

I was present during part of the time and observed the testing being done therefore, I concur with the finding of Construction Control.

One of the basic problems is the construction of the brickwork, the assembly of which is completely contrary to the Ontario Building Code regarding cavity wall construction, a cavity wall being any wall that has a space between the inner and outer wythe as is the case at 30 Glen Elm where the space between appears to be approximately 1 inch in the area observed. The Ontario Building Code, under section

4.4.5.14. (1)-(3) states that "where the space is not filled, such walls shall conform to the requirements for cavity walls".

In this case the masonry is:

- (1) not parged on the back of the face wythe.
- (2) not vented to allow for dispersal of moisture entrapped between wythes.
- (3) there is no through wall flashings as required by the code.

There is also an absence of vapor barriers in some locations which again is contrary to the code.

The visual result of the existing conditions is the extreme efflorescence on the masonry and the ingress of water into areas of the building.

Further testing on a balcony slab indicates that water is penetrating at the recess in the slab which accommodates the insulation.

As these conditions were existing within the first year of the condominium's registration, and as they were noted to your firm and also to the New Home Warranty Program, it is, under the terms of your registration, the responsibility of your firm to properly make the necessary corrections to the matters at fault. Should you not do so then the New Home Warranty Program will assume your responsibility and proceed to rectify the situation where required. Should we be obliged to do this, your firm will be invoiced for all warranted work done by us, plus administrative costs (and interest where applicable), the recovery of which will be pursued by all legal means.

I would strongly suggest that a meeting be held with all interested parties within the next few days and that you call the writer upon receipt of this letter so that arrangements may be made. Should we not hear from you by the 30th of September 1982 the New Home Warranty Program will have no choice but to act in this matter.

Yours truly,

"Ray Dade"

Mr. Ray Dade  
Technical Representative.

October 14, 1982

(Exhibit 26)

High City Holdings Ltd.  
5300 Yonge Street  
Willowdale, Ontario  
M2N 5R2

Attention: Mr. Serota

Re York Condominium Corporation No. 528  
30 Glen Elm Road

Dear Sir:

At this time I find that I am unable to communicate with Mr. Wygodny, for whatever reasons, therefore I address this letter to you.

On September 24, 1982 I sent a letter to your office addressed to Mr. Wurman who I understand is no longer with High City Holdings. In the letter, a copy of which is enclosed, I noted four problems with the walls of the building, all four of which contravene the Ontario Building Code. It is our mandate, that when a condominium addresses complaints to us, we order the builder to make corrections, or if he fails to do so the New Home Warranty Program assumes the warranty obligations.

In light of the fact that I cannot seem to get in touch with Mr. Wygodny and that no one at High City Holdings seems desirous of coming to grips with the problem I must give you an ultimatum.

Therefore, should there be no positive action from High City Holdings within 7 calendar days from receipt of this letter the New Home Warranty Program will proceed to do the work and invoice your firm accordingly.

Yours truly,

"Ray Dade"  
Mr. Ray Dade  
Technical Representative.

VIA COURIER

December 19, 1984

(Exhibit 40)

York Condominium Corp. No. 528  
c/o Hahn & Maian  
Barristers and Solicitors  
664 Mount Pleasant Road  
Toronto, Ontario  
M4S 2N3

Attention: Mr. John Hahn

Dear Sir:

Re: Claim dated April 4, 1984  
Our reference #10-8934-61393

This letter is the Warranty Program's decision in keeping with Section 16 of the Ontario New Home Warranties Plan Act.

By a letter delivered to the writer on April 4, 1984, York Condominium Corporation #528 claimed for payment on the following matters:

- a) Stains (efflorescence) on the outside of the brick walls.
- b) Balcony slab leaks.
- c) Vertical cracks in the brickwork at certain exterior locations.

In further review of the claims, it has become evident that there are five items to be considered and, for simplicities (sic) sake the Warranty Program has indentified them as follows:

- 1) Efflorescence
- 2) Balcony slabs
- 3) Exterior wall construction
- 4) Vapour barriers
- 5) Vertical cracks in brickwork

Regarding each of these matters, I offer for your consideration the following comments and observations:

- 1) The problem of staining and efflorescence was reported to the Warranty Program prior to the first year anniversary of the registration of the condominium declaration and, was addressed by us as a vendor's warranty matter. The masonry contractor had not in our opinion, properly cleaned the brickwork after construction as good building practice would required (sic). In addition, some efflorescence had occurred. The Warranty Program arranged and paid for the proper cleaning of the brickwork during October 1983 at a cost of \$27,100.00.



Efflorescence is a condition whereby fine (white) crystals formed on the surface of the brick and mortar joints. It is usually caused by excessive wetting of the brickwork. The wetting dissolves (sic) salts contained in the masonry components and the process of evaporation deposits the salts as crystals on the exterior face of the masonry wall. Experts seem to agree that efflorescence is a time limited occurrence since, once all of the salts in the assembly have been dissolved (sic) and brought out of the wall the phenomenon stops. Of course anything that can be done to prevent excessive wetting will reduce the amount of the surface deposits.

In the opinion of our consultant, water in (sic) entering the masonry assembly at 30 Glen Elm Avenue from exterior sources such as the balcony slabs, which have designed drainage patterns whereby each balcony drains onto the one located below it. This drainage pattern saturates the walls in the balcony areas and is the most probably (sic) cause of the minor amount of efflorescence that has re-occurred since our cleaning of the walls in 1983.

The problem then is one of design rather than workmanship or materials. If the balcony drainage was to be changed by for instance installing drain spouts to shed the water away from the building, the problem might be resolved.

Additional moisture may be entering the walls through shrinkage and temperature related mortar joint cracks and areas of deteriorated caulking. These problems should be addressed by the condominium as part of their normal maintenance program.

- 2) Regarding balcony related leaks, this matter as well was reported in the few units during the first year of registration. It is the Warranty Program's understanding of the problem that it is caused by the fact that the design calls for the masonry walls to rest on the structural, concrete floor slabs with no provisions (sic) in the design to prevent water entering the wall assembly from the higher surface of the balcony topping and, thus into the adjoining suite. (This condition is also contributing to the problem of efflorescence explained in Item 1).

Of the 40 units making up York Condo Corp 528, we are aware of 4 units which have such water entry problems.

- 3) We have reviewed the built construction (sic), design drawing and specifications in respect to the masonry walls of the building and are satisfied that they are constructed in keeping with the contract drawings and, are structurally sound. This particular claim was not presented to the Program until after the expiry of the Vendor's warranty and, can only be considered under the provisions of the major structural defect warranty.
- 4) Similar to Item No. 3) the matter of vapour barrier installations was not reported to the Warranty Program until after the Vendor's warranty had expired. Our investigation into this matter confirmed that in a very few small areas and, not on a consistent (sic) basis, some vapour barrier has been omitted. However, there is no damage evident of a structural nature or otherwise, that might be attributed to this condition. Having specifically checked areas where efflorescence has occurred, we found the vapour barrier to be properly in place. In our

opinion, the fact that some minor areas of the assembly may not be vapour barriered, does not contribute to the problems being experienced in this building to any degree.

- 5) Regarding verticle (sic) cracks evident in the building, one such crack at the east end of the building was apparently previously repaired (by the builder). It was in the opinion of our consultant caused by the normal occurring forces of shrinkage associated with the curing of the structural concrete walls behind the brick veneer. However, at one location at the top (balcony) corner of the west end of the building, there is a significant masonry crack apparently due to a lintel related problem. The Warranty Program estimates that particular problem could be rectified at a cost of no more than \$1,000.00.

Take notice, it is the Warranty Program's decision that none of these matters are covered by the provisions of Section 14 of the Ontario New Home Warranties Plan Act.

Our reasons for this deicision (sic) are as follows:

- a) The Condominium Corporation has not proven that any defects in materials or workmanship exist that result in failure of the load bearing portion of the building, or materially and adversely affect its load bearing function.
- b) No defects in materials or workmanship have been shown to exist that materially and adversely affect the use of the building for the purpose of being a residential condominium.
- c) There is no significant damage due to soil movement, no major cracks in basement walls, no collapse or serious distortion of joints or roof structure, and no chemical failure of materials.

- d) Any dampness that has occurred does not arise from failure of a load-bearing portion of the building.
- e) Any damage that has occurred is damage to finishes.

Furthermore, with the exception of Item 1) and Item 2) none of the matters were reported to the Warranty Program within one year after the registration of the declaration.

Regarding Item 1), staining to the exterior brickwork, the Warranty Program contracted and paid for cleaning off of mortar droppings, efflorescence, etc. associated with the original construction. Any further efflorescence that may have occurred is not a result of substandard workmanship or defective material, does not render the building unfit for habitation and does not result from construction not in accordance with the Ontario Building Code. It does to the best of our knowledge result from the failure of the design to prevent water from being directed onto and into the masonry. Any cracks that may exist in the mortar joints or caulked joints are a result of shrinkage caused by drying after construction and/or normal wear and tear. Any contribution to the efflorescence due to normal wear and tear is a result of failure in the part of York Condo Corp No 528 to properly maintain these areas.

The leaks associated with the balcony slabs are not a result of poor workmanship, defective materials or construction not in accordance with the requirements of the Ontario Building Code. They do not render the building unfit for habitation. The leaks are to the best of our knowledge due again to the failure of the design to anticiapte (sic) water entry or the effect of the balcony drainage pattern.

Section 16(2) of the Act requires that I inform you that you are entitled to a hearing by the Commercial Registration Appeal Tribunal if within 15 days you mail or deliver notice in writing requiring a hearing to both, the Warranty Program and the Tribunal.

In respect to the crack repair at the top (balcony) corner at the west end of the building, the Warranty Program is prepared to pay to Y.C.C #528 the sum of \$1,000.00 in full and final settlement of that item.

Yours truly,

"R. Maling"  
Robert Maling  
Manager  
Condominium Section

It will be noted that some of those letters were written to the vendor and developer, High City Holdings Ltd. As has already been indicated it is our opinion that High City Holdings Ltd. was a rather villainous entity. Our opinion, further, is that Mr. Dade and Mr. Maling, by means of their letters, were endeavouring to persuade or otherwise induce High City Holdings Ltd. to somehow do its honourable duty by these unit holders and the Condominium Corporation upon whom it had fobbed or otherwise conveyed the results of its shoddy incursion into the construction field. The purpose of their letters to the abominable developer was without question an honourable purpose - simply, and on behalf of the present Appellant and the unit holders who are not parties to these proceedings, to induce it to remedy the perceived defects in its construction of this building. None of the interested parties to this appeal would have other than applauded their efforts, especially had they produced the results which they intended, that is, to have brought about the restoration or cure of the problems to which they referred. However, they didn't, because the developer either wouldn't or couldn't undo its structural misdeeds before being overtaken by nemesis. It is not clear to us whether this took the form of bankruptcy, the absconsion of its officers and principals, or just what, but, as appears, the High City entity has now, metaphorically speaking, disappeared from the screen.

This left Mr. Dade and Mr. Maling, like so many letter-writers before them, as well as their employer, the Warranty Program, in an ostensibly compromised and certainly embarrassing position. This was vis-a-vis the Appellant and the unhappy unit holders. Now the latter have taken the position that the Warranty Program is bound by their assertions or undertakings (set forth in the letters) as to the liability of the Warranty Program or by their assertions (in the letters) that the warranty, in the cases of these claimants, was viable.

We repeat, the indiscretions (as the Warranty Program has no doubt come to see them) contained in the Dade/Maling letters were intended to effect a good purpose. Equity, were it to come to some involvement in this issue (which it doesn't) would smile or at least look without disfavour upon that innocent fact at the outset. The claimants, both known and suspected in this case, now pin their hopes to the notion that the Warranty Program, having putatively accepted liability for these problems in that correspondence, and having done so in writing, is in fact liable. That notion, so logical and straight forward in the mind of any simple right-thinking non-specialist observer, especially one who perceived a substantial financial benefit from it, becomes significantly less so when passed through the mind of a lawyer. For those who have received the alleged advantage of a legal education will know that a warranty which was bestowed in the first instance by an Act of provincial parliament and which, upon the terms upon which it was created, has already expired, terminated, lapsed and died, cannot be brought back to life by a mere letter, no matter how well-intentioned or indiscreet. Parliament decreed that the warranty would die at midnight at the end of its first year of existence. Once dead, only Parliament can bring that warranty back to life. Nothing, no matter how well-intentioned and foolish, written or stated by an employee, agent or official of the Warranty Program can alter or impede the inevitable operation of an Act of the Provincial Legislature.

But equity presents a possible exception to that general rule. This is the doctrine of estoppel. Had the Warranty Program, by the letters to which exception has been taken, somehow induced the applicant of any other claimants to sustain a detriment in reliance upon the assertion set out in the letters referred to, then, on the authority of the rule in Re: Wentworth Condominium Corporation No. 45, a Ruling released by the Tribunal April 17th, 1985, the Respondent would have been estopped from relying on Section 15 of the Act and from maintaining that the warranty had expired when the claim was made.



But that is not the case in this instance. Neither the Appellant nor any of the unit holders (who are not parties to this appeal) suffered any detriment springing from any reliance they may have placed upon the Respondent's letters. This was because their rights under the Warranty were already dead when the first of such letters went out. He who lies on the ground cannot fall. He who is already dead cannot be slain. He whose rights are already dead cannot sustain a detriment - other than disappointment - from the communication to him of erroneous information, no matter how well or ill-intentioned. Consequently, the Dade/Maling letters upon which the Appellant has placed some reliance and which are no doubt of considerable embarrassment to the Respondent are of no effect at law. And that is why this appeal in respect to the bulk of the claims to which it relates must fail.

We feel that it must go without saying that we have a very great deal of sympathy with the Appellant and the unit holders who are involved in this unfortunate matter. We wish them well in whatever further proceedings they may decide to undertake elsewhere. We are very pleased to be able to allow them the relief referred to in respect of the cleaning or repairing of the efflorescence, referred to above, as well as to the crack to which mention has been made.

We agree that they are the victims of a "raw deal" from the vendor. However, we are unable to find that the Ontario New Home Warranties Plan Act, save as to the extent mentioned, is available as a tool to help them.

DISSENTING DECISION

The following is the Decision of Helen J. Morningstar, Member.

I concur with the Decision of Matthew Sheard, Vice-Chairman, and D.H. MacFarlane, Member, with one exception, which appears below with reasons:

The Ontario New Home Warranties Plan Act (ONHWP Act) is consumer legislation designed to protect the public from unscrupulous and shoddy builders. If a builder reneges on his contract, the Ontario New Home Warranty Program (ONHWP) takes over and repairs any problem areas. This is the reason for my dissenting decision on this one point.

In its decision letter, [Exhibit 40(2)] signed by Robert Maling, Manager, Condominium Section, ONHWP, the Program stated that "regarding balcony related leaks, this matter was reported in the few units during the first year of registration". This is a requirement of the Act, Section 13(4).

Janet Stubbs, a graduate lawyer, practiced with McCarthy & McCarthy and is now an opera singer, testified that she purchased a condominium #213 in June 1982, almost two years after it was registered, and complained to the ONHWP about water penetration into her suite. It was repaired to her satisfaction, and she has had no further problems. Nowhere in evidence did she send a claim form, or a claim in writing to the ONHWP as required in the Act, Regulation 726, Part II, Section 4(1)(2)(3).

Mr. Lambie complained in writing to the builder with a copy to the ONHWP regarding problems in his unit #303, Exhibit 35, but an unsigned note on Lambie's letter stated that Wurman (for the builder) says he has inspected and cannot find any leak - unsigned writer to write Lambie.

Mr. Nathanielsz, President of York Condominium Corporation #528 said in evidence that his condominium unit had been repaired, but there was no evidence that he had sent either a claim form or a claim letter to the ONHWP.

A letter from Robert Maling of the ONHWP dated April 6, 1983 to York Condominium Corporation #528 stated that there were two matters of major concern to York Condominium Corporation #528 still outstanding - water entry into balcony slab/wall, and efflorescence. The last paragraph stated "Mr.

Dade feels we are now sufficiently prepared to solve these matters and should High City Holdings fail to honour their warranty obligations, please be assured that the Warranty Program will do so in their stead". This surely indicates acceptance of responsibility to repair the balconies, as do other letters (please see Exhibit 24, page 8 of decision, Exhibit 25, page 9 and Exhibit 26, page 11, and as recently as January 23rd, 1984, a letter, Exhibit 52A).

January 23, 1984

(Exhibit 52A)

Mr. A.J. Nathaniels  
30 Glen Elm Avenue  
Suite 108  
Toronto, Ontario  
M4T 1T7

Dear Mr. Nathaniels:

Re York Condominium Corporation No. 528  
Our file No. 10-8934-(61393)

The drawing which accompanies this letter is the design of Mr. Tibor Pal and shows our proposed method of doing the balconies. While it will be an expensive and time consuming job we feel that over the long term it will be better than installing a top membrane.

It will also eliminate water run-off onto the masonry walls, which has been a large part of the efflorescence problem and will also make it much easier to effect repairs, if required, over a long period of time.

Thank you for your cooperation in allowing us to examine the exterior walls in your suite. It demonstrated that certain elements of vapor barrier are missing however, our evaluation of the condition is such that we cannot be sure to any degree the effects those conditions have had on the extremes of efflorescence on the exterior walls.

It is therefore, our intention to carry on as soon as possible to work on the masonry by saw cutting, tuck pointing and replacement of brick where necessary, and upon completion of that action to caulk all areas as necessary.

Once that is done, together with the balconies, the brickwork will be monitored to see if further steps are required should severe efflorescence recur.

Yours truly,

"Ray Dade"  
Ray Dade,  
Technical Representative  
Condominium Section.  
RD/lb

Mr. Nathanielsz, then President of York Condominium Corporation #528, acting as agent for the unit holders of York Condominium Corporation #528 (he signed claim forms Exhibit 36A, B, C and F) "A.J. Nathanielsz for York Condominium #528". This was in response to Mr. Maling's request that he send the claims to the ONHWP. On these forms he reported claims to the builder with copies to the ONHWP dating back to December 3, 1980.

The law governing this is found in Section 13(4) of the Ontario New Home Warranties Plan Act "Terms of Warranty under subs.(1)", and does not state that claims made in the first year after registration "die on the vine" because they were not settled then - there is no expiry date!

The ONHWP through its officers admitted problems of water penetration into the balconies and only changed their position when the builder disappeared leaving them an expensive repair problem. They defended their position by saying that the problem was caused by design, therefore the ONHWP was not responsible to repair it. If this were so, they should not have assured the unit owners that the ONHWP was going to rectify the problems they were having with their balconies. By repairing the balconies of Miss Stubbs and Mr. Nathanielsz, and maybe Mr. Lambie, they set a precedent.

Since this problem was admittedly communicated to the ONHWP within the first year of registration, the ONHWP has a responsibility to repair the problem balconies to prevent further water penetration.

### CONCLUSION

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act and pursuant to the above Majority Decision (as well as those elements of the dissenting opinion which conform with it) the Tribunal orders and directs the Respondent:

1. To repair or clean away, forthwith upon the release of this Order, the efflorescence upon the brickwork at the subject building where it has recurred severely and subsequently to the original work done to it heretofore by the Respondent in October, 1983. Such repair or cleaning is to be deemed the final settlement of the problem of efflorescence complained of pending any further order of the Tribunal or a Court of superior jurisdiction.

2. To repair, forthwith upon the release of this Order, a certain masonry crack, at the top (balcony) corner of the west end of the subject building, which said crack is apparently due to a lintel-related problem and has been referred to at Page 4, paragraph 5, of a certain letter of the Respondent's (signed by Robert Maling) dated December 19, 1984 and entered as Exhibit 40 to these proceedings. \*

\* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by York Condominium Corporation No. 528. The appeal had not been concluded at the time of this publication.

KENNETH M. FAWCETT

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REVOKE THE REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C. CHAIRMAN  
KENNETH VAN HAMME, MEMBER  
WILLIAM J. BINGLEY, MEMBER

COUNSEL: KENNETH M. FAWCETT, appearing in person  
STEPHEN MARTIN, representing the Respondent

DATE OF  
HEARING: 17 April 1985 Toronto

REASONS FOR DECISION AND ORDER

The Tribunal finds that, though during the relevant period the Appellant was not registered, his conduct is to be assessed as if he in fact was so registered.

The Tribunal finds that the Appellant acted as a real estate salesman in a trade with respect to a restaurant called "Viva Restaurant and Night Club" at 1910 Yonge Street.

The trade is evidenced by an Agreement of Purchase and Sale, Exhibit 12, dated the 11th day of April 1984, signed by Musella for the vendor and by the Appellant in the name of the purchaser, from whom he had a broad power of attorney.

The agreement stated:

"The purchaser submits with this offer \$10,000 certified cheque payable to purchaser's agent as a deposit to be held by him in trust pending completion or other termination of this agreement and to be credited towards the total purchase price on completion."

There was, in fact, in evidence a cheque for \$10,000.00 made out by the purchaser properly to Montreal Trust Company of Canada "In Trust". The cheque was never deposited



in the trust account maintained by Montreal Trust nor did the Appellant disclose the trade to his broker which had no knowledge of the transaction, nor a deposit related thereto.

The Appellant explains the failure to turn the cheque over to the broker for deposit by his belief that the cheque related to an offer dated the 4th day of April, 1984; and when that was not accepted, that that deposit no longer existed as such. However this was not conveyed to the vendor. Indeed, there had been a substantial discussion about the form of the deposit (in that it was somewhat unusual), the vendor acquiescing in the form.

The words of the April 11th agreement are clear in this respect as I have quoted. Either the Appellant had in fact reinstated the deposit cheque as such by virtue of his broad power of attorney, or he had misled the vendor as to the existence of the deposit. He should have either attended to the deposit of the cheque or made known to the vendor that there was no cheque. Many days passed; the purchaser went into the operation of the business in all aspects. The Appellant took no action with respect to the deposit, keeping it from the broker and not making known to the vendor the Appellant's view of the deposit, nor that he had not delivered the same to the broker for deposit within the regulation requirement time or otherwise.

The Tribunal need not reiterate at any length its reported views of the significance of the trust funds - as being the most basic, and perhaps most significant, aspect of the business regulated herein. The Tribunal finds that the Appellant's behaviour in respect thereof was not in accordance with the term "trust".

The Tribunal finds that the past conduct of the registrant affords reasonable grounds for belief that he will not carry on business in accordance with law, and with integrity and honesty.

Accordingly by virtue of the authority in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to revoke the registration.

GIOVANNI GIANNINI

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF  
REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman as Chairman  
BARBARA SHAND, Member  
DONALD MANCHESTER, Member

COUNSEL: DAVID IVEY, representing the Appellant  
STEPHEN AUSTIN, representing the Respondent

DATE OF  
HEARING: 23 May 1985 Toronto

REASONS FOR DECISION AND ORDER

The Real Estate and Business Brokers Act, R.S.O. 1980, Chapter 431, provides in Section 6(1)(b) that an applicant is entitled to registration [as a real estate salesperson] except where his or her past conduct affords reasonable grounds for belief that he or she will not carry on business in accordance with law and with integrity and honesty.

On July 30th, 1984, the Assistant Registrar of Real Estate and Business Brokers wrote to the Appellant a letter which begins as follows:

Dear Mr. Giannini:

We received your application for registration as a real estate salesperson last January. No action was taken since we understood that you appeared in court and were convicted on a charge of conspiracy to import counterfeit money.

In view of the fact that you were in jail, we were unable to register you....

Subsequently the Registrar issued a Proposal to refuse the Appellant registration as a real estate salesman. The Proposal cites the above mentioned Section 6(1)(b) and the effect of the Appellant's past conduct upon the provision of law therein set forth.

At the time of the hearing the Appellant, as we were informed still under sentence of the Criminal Court, was on probation in respect to the balance of the sentence imposed upon him following the conviction referred to.

Particulars of the criminal offence, which was the subject of the conviction referred to in the letter quoted above, were provided to the Tribunal by Sgt. Martin of the fraud branch of the Hamilton Wentworth Police and these particulars contained in that witness's evidence (which the Tribunal accepts as fully truthful) disclose a criminal predisposition or propensity, a past record of dishonesty and lack of integrity, such as to convince the Tribunal that the applicant is quite unfit for registration in this industry or any industry in which honesty, integrity and the ability to carry on business in accordance with law and integrity and honesty are prerequisites.

The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women whom they may look to for advice and honest counsel in the course of business with complete confidence.

The real estate industry is one in which major transactions involving large sums, often sums representing people's life savings, are involved. Only persons of complete trustworthiness should be considered suitable for registration and certainly not persons with the kind of gross criminal record of which we have heard today, which is a very serious record of a sophisticated conspiracy with other criminals operating both in Canada and in the United States to illegally import a very large sum of counterfeit money into Canada for the motive of profit and, be it noted, at a time when the Appellant's prior registration as a real estate salesman, subsequently revoked, was in good standing. The crime in respect of which the Appellant was convicted and is still under sentence fully justifies the Registrar's Proposal to refuse registration which is a Proposal based on the Registrar's opinion of past conduct and which Proposal the Tribunal wholeheartedly upholds.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act the Tribunal directs the Registrar to carry out his Proposal.

RODNEY C. HARTH

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF  
REAL ESTATE AND BUSINESS BROKERS

TO REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman as Chairman  
F. THOMAS PEOTTO, Member  
JOHN W. PATERSON, Member

COUNSEL: TIMOTHY G. GOAD, representing the Appellant  
STEPHEN AUSTIN, representing the Respondent

DATE OF  
HEARING: 24 June and 16 July 1985 Toronto

REASONS FOR DECISION AND ORDER

This was an appeal from a Proposal of the Registrar of Real Estate and Business Brokers to revoke the registration of the Appellant as a registered real estate salesman.

Section 8(2) of the Real Estate and Business Brokers Act, R.S.O. 1980, Chapter 431 reads as follows:

Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 6 or 7 if he were an applicant or where the registrant is in breach of a term or condition of the registration.

Section 6(1)(b) reads as follows:

An applicant is entitled to registration or renewal of registration by the Registrar except where,

....

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty...

The Notice of Proposal over the signature of Alan Coleclough, Registrar of Real Estate and Business Brokers and dated at Toronto the 24th day of December, 1984, sets out the reasons for the Proposal, namely that:

In my opinion, Harth's registration should be revoked as:

- (a) the past conduct of Harth affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The following Particulars were provided at the bottom of page 2 reading:

IT IS ALLEGED AS FOLLOWS:

1. Harth was first registered as a salesman under the Act on or about the 18th day of November, 1982, being employed at the Canada Trust Company, 415 Hespeller Road, Cambridge, Ontario (the "Company").
2. In or about the month of August, 1984, Harth became involved as a salesman in showing a property municipally known as 149 Cambridge Street, Cambridge, Ontario, (the "Property"), to Mrs. Joni Munns, a part-time receptionist employed by the Company.
3. On or about the 15th day of August, 1984, Mr. and Mrs. Munns attended at the Company whereupon Harth was requested to prepare an Offer to Purchase in the amount of \$38,000, which offer was subsequently executed by Mr. and Mrs. Munns.
4. Harth subsequently presented the Offer to Purchase to the vendors, which offer was accepted.
5. Several days thereafter, Mrs. Joni Munns, acting on her husband's instructions, altered the original Agreement of Purchase and Sale,

contained in the office files of the Company, whereby the purchase price was altered to \$39,000.

6. Immediately thereafter, Harth attended at the residence of Mr. and Mrs. Munns in order to assist them in the preparation of an application for Mortgage Loan (the "Application" with Montreal Trust, 101 Frederick Street, Kitchener, Ontario ("Montreal Trust"). For this purpose, a blank Application was provided by Harth.
7. At this point in time, Mr. Munns produced the altered Agreement of Purchase and Sale which was examined by Harth and used to complete the Application.
8. As a result, Harth completed, or assisted in the completion of, the Application which falsely represented the purchase price of the Property to be \$39,000.
9. Upon completion of the Application, the Application plus the altered copy of the Agreement of Purchase and Sale was given to Harth by Mr. Munns with the instructions that the Application was to be submitted by Harth on behalf of Mr. and Mrs. Munns to Montreal Trust for loan approval.
10. The following morning Harth attended at the offices of Montreal Trust, whereupon he presented the altered Agreement of Purchase and Sale knowing it to have been altered and the application, knowing it to contain false information, to the mortgage manager for approval.
11. As a result of the false information provided to Montreal Trust, an Approval of Mortgage Loan was obtained by Mr. and Mrs. Munns with the condition that the loan was "subject to a sale price of no less than \$39,000."



The Tribunal holds that the foregoing is a reasonably accurate recital of the facts.

At the hearing counsel for the Registrar summed up the evidence substantially as follows. On or about August 15th, 1984 Mr. Harth showed a residential property to Ernest and Joni Munns. As a result they instructed him to prepare an Offer for \$38,000. This was executed by the Munns on the 15th day of August and presented to Mr. McTaggart and accepted on August 15th. There was a condition. The condition was that within 21 days the purchasers obtain a mortgage commitment for 90% of the purchase price. One night the Munns asked Mr. Harth to help them prepare a loan application. They produced an altered Agreement of Purchase and Sale showing a figure by way of purchase price of \$39,000. They explained that they were having trouble obtaining funds. Mrs. Joni Munns explained how the altered form had come into being. She had, as an employee of the Real Estate firm with whom Mr. Harth was also employed, used a xerox copy machine and certain whiteout solution and the same typewriter which had been used to type out the original document, and prepared the altered document substantially as alleged in the Proposal hereinbefore referred to. Mrs. Munns testified that Mr. Harth then said that what they were proposing was wrong and that they could get into trouble. Without much coaxing however, he decided to go along with this fraudulent and improper scheme. He did not at once back out of the transaction as he ought to have done. Counsel for the Respondent further alleged that Mr. Harth agreed to be a co-conspirator in the attempted fraud upon the proposed mortgagee by uttering it to the latter knowing it to contain false information as to the purchase price.

Mr. Harth, according to his version of the events, said he decided to speak to his broker-manager, one Sherry Julius, before presenting the application to the proposed mortgagee and he claims she advised him "to go ahead" because "he wouldn't get caught". Diametrically opposed to this testimony was the testimony of Sherry Julius herself who has been with Canada Trust since 1979 and was the broker-manager of the Canada Trust office at the time in question. A past director of the Cambridge Real Estate Board and a past Chairwoman of their Ethics and Arbitration Committees, she stated quite emphatically that such a meeting never took place. The only time she ever spoke with him, she said, in connection with the 149 Cambridge Street property, was at a meeting to discuss whether Mr. Harth had "stolen" the Munns from another salesperson, Pat Buger. She said that he bragged that he was the "only one who could put the Munns deal together because of his skills at creative financing".

Other witnesses gave evidence which tended to attest that a meeting between Sherry Julius and Mr. Harth did take place. We can't be sure, however, what was said either by Mr. Harth or Sherry Julius at such meeting or meetings or why such meeting or meetings took place.

The final conclusion of the Ethics Committee is interesting and worthy of note. It is to be found at page 7 of the transcript of the hearing which was exhibited before the Tribunal as Ex. No. 10. It reads as follows:

#### SUMMARY

In the event of an appeal the ethics committee conclusions are as follows: Although Rod, we believe did approach his broker concerning the changes in the offer and mortgage application and was not given correct guidance by said broker but proceeded knowing it was wrong and the committee felt that the fine of \$250 and that he be reprimanded for said doings.

The Tribunal in its assessment of the evidence in its totality is not at all sure that this man should be permitted to continue in this industry. We would be inclined to uphold the Registrar's Proposal to expel him from it were it not for the alleged complicity of his supervisor, the broker-manager Sherry Julius, in the wrongdoing which undoubtedly took place. But we feel that for one wrong to be punished and another not punished offends the basic concept of fair play. If Sherry Julius, the broker manager of the office in which the Appellant was engaged, was aware of the attempted fraud that was being proposed (and since she has not been on trial before us we are making no absolute finding of fact in this regard) her duty would have been to stop it. In the ultimate analysis of the evidence in this case the extent of the Appellant's culpability is not capable of precise measurement.

The Tribunal also finds that in assessing the Appellant's conduct his age and potential for reform, rehabilitation and improvement should be taken into consideration.

Section 9(4) of the Act reads in part as follows:

Where an applicant or registrant requires a hearing by the Tribunal...the Tribunal...may by order direct the

Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

In this case upon a due consideration of all the factors involved and of the evidence, the Tribunal feels that the past conduct of the applicant does not afford reasonable grounds for belief that he will not [in future] carry on business in accordance with law and with integrity and honesty. The Tribunal holds that the Registrar ought to refrain from carrying out his Proposal and the Tribunal Orders and Directs accordingly.

However, wrongdoing has occurred and a sanction, in the Tribunal's further opinion, is necessary by way of an assurance to the public and a warning to the industry at large that such wrongdoing will not be tolerated.

Therefore by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act the Tribunal directs the Registrar to refrain from carrying out his Proposal to revoke the Appellant's registration but instead to suspend the same for a period of two months commencing forthwith.

PETER KODIS

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF  
REAL ESTATE AND BUSINESS BROKERS

TO REFUSE REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN  
DR. STUART E. ROSENBERG, MEMBER  
SADIE MORANIS, MEMBER

COUNSEL: MARTIN KERBEL, representing the Appellant  
STEPHEN AUSTIN, representing the Respondent

DATE OF HEARING: 9 September 1985 Toronto

REASONS FOR DECISION AND ORDER

The Applicant has a history of employment as a registered real estate salesman from about the period the 13th May 1974 until about 5th June 1977 and has a record of applications during and after.

On or about the 12th February 1985, the Applicant filed a new application for registration under the Act. Upon a consideration of the same by the Registrar, the Registrar issued a Proposal to refuse to grant registration to the Appellant as a real estate salesman for two reasons:

"In my opinion the Applicant is not entitled to registration under Section 6 of the Act as

(a) having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or

(b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty."

The basic facts relating to the history of the registration and applications of the Appellant are set out in the Notice of Proposal. There is no dispute in respect of those items listed as convictions. Explanations have been given in respect of some of the facts relating to his salesman's employment by the Applicant.

On the 24th May 1974, the Applicant applied for registration under the Act. In his application the Applicant answered "Yes" to a question 6 therein which stated:

"Have you ever been charged, indicted or convicted under any law of any country or state or province thereof, of a criminal offence or are there any proceedings now pending. If yes, give full particulars."

Particulars were given by the Applicant in respect of five convictions over a period from 1959 to 1970. The Applicant was registered as a salesman.

On or about the 1st October 1974, the Applicant filed with the Registrar a notice of change indicating he was transferring his employment from Munshaw Real Estate Ltd. to Canada Permanent Trust Company and the Applicant has given an explanation for the change. On May 10, 1976, the Applicant's employment with Canada Permanent Trust Company was terminated.

By an application dated the 16th June 1976 and filed on or about 22nd June 1976, for registration under the Act as a real estate salesman for Montreal Trust Company, the Applicant answered "Yes" to a question 9(a) on the question form:

"Have you ever been convicted under any law of any country or state or province thereof, of a criminal offence or are there any proceedings now pending. If yes, give full particulars."

The Applicant did not list that there were pending charges related to possession of a stolen credit card in respect of which on 23rd June 1976 he was fined \$150 or a period of incarceration for six weeks in default. It is to be noted that the note attached to the question is: "where the Applicant has been previously registered list only those convictions which occurred since the last filing. You are not required to disclose any convictions in respect of which pardon has been granted." However the question proper states, "If yes, give full particulars of all such convictions and proceedings."

In May of 1978 the Applicant made a further application for registration under the Act as a real estate salesman to be employed by the Montreal Trust Company. In the application for registration the Applicant answered "Yes" to question 9(a) therein which states:

"Have you ever been convicted under any law of any country or state or province thereof, of a criminal offence or are there any proceedings now pending. If yes, give full particulars."

The Applicant failed to disclose in this application that he had since the earlier application had been finalized, been convicted of two criminal offences - one, June 23rd, 1976, respecting the possession of a stolen credit card and on the second, on August 9th, 1977, possession of stolen property over \$200 for which he was sentenced for a four month period of incarceration.

It is to be noted that the Applicant had already earlier in 1974 filled out an application form in which he had given particulars of the convictions up to the time of that filing.

The application of February 12th, 1985 has a question 7 as set out in the Notice of Proposal and the Applicant answered "Yes" and listed 8 convictions. He omitted to list 3 convictions.

The first was with respect to failure to comply with conditions of recognizance for which he was sentenced to a period of incarceration of 30 days concurrently. An explanation given in respect of this omission was that it would have taken place concurrently with the conviction of the same date of living on avails of prostitution and that the two items might have been considered as being part of the same.

The second omission was in respect of a conviction on the 17th November 1983 for Personation for which the Applicant was sentenced to 1 day in jail plus a fine of \$350 or a further 20 days in jail, in default. It has been submitted to this Tribunal that that is not an offence to which serious consideration should be given in the light of the explanation that was given, i.e. a visit to Florida to a son, and in that the penalty imposed was not all that severe. The Registrar has indicated that he has treated this omission as being a serious



one; the Tribunal agrees with the Registrar for the act of personation has the element within it related to taking advantage in purporting to be other than what one is.

The third omission was in respect of a conviction on the 16 February 1984, possession of stolen property for which he was fined \$800 or 6 months in jail, in default. The Tribunal notes that the rationalization of this omission because of another conviction at the same time does not have validity because of the 10 day gap, and in that the two offences were completely different and insofar as the Tribunal is aware, completely independent and unrelated to each other.

The Tribunal is of the opinion that the past conduct of the Applicant is the factor to be considered. Time and time again, this Tribunal has pointed out the seriousness of non-disclosure of matters, particularly convictions and proceedings pending which are the very basis upon which the Registrar is called upon to exercise most of his discretion. Though it would appear that the Registrar, in the discharge of his responsibilities, checks and double checks by obtaining records, this is a responsibility and obligation which should not necessarily be upon the Registrar. He should be entitled to rely upon the application form which is submitted to him. The Applicant has given explanations in respect of certain omissions yet those omissions are of a kind that the Tribunal can infer that there was some act of deliberation in respect of the omissions and the selection of convictions which were made known.

The Tribunal is of the opinion that public protection under this consumer legislation is of paramount importance. This basic principle underlines all the consumer legislation which is set forth for the protection of the public. The Tribunal is aware of the fact that in the discharge of their employment as real estate salesmen they may have fairly free entry into homes, often they have the keys, and property is exposed. It has been pointed out to the Tribunal that during the period of employment as a real estate salesman there were no adverse reports respecting the Applicant with regard to his dealings, no elements of fraud exhibited and, indeed, that he was a good real estate salesman. But the opinion of the Registrar and this Tribunal is not to be so restricted.

Accordingly the Tribunal is of the opinion that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Tribunal has considerable sympathy with the applicant and the position he finds himself in. The Tribunal is aware of his resort to medical treatment which appears to have had favourable indications. The Tribunal is aware that there is a period of probation which has already been served and a period which has yet to be completed during which time his behaviour will be under scrutiny of another authority. The Tribunal does reiterate the section in the Act which has been referred to by counsel for the Registrar, section 10:

"A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

Being aware of this provision, it may be that the applicant may see fit to take such action after a period of time whereby such an application could in all propriety be placed before the Registrar for his consideration.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

JOHN NOEL WALTON

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REFUSE REGISTRATION

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN  
F. THOMAS PEOTTO, MEMBER  
WILLIAM BINGLEY, MEMBER

COUNSEL: JOHN RODENHURST, representing the Appellant  
A.N. MAJAINA, representing the Respondent

DATES OF  
HEARING: 8 July and 22 August 1985 Toronto

REASONS FOR DECISION AND ORDER

This hearing is an appeal by John Noel Walton from a Notice of Proposal dated July 18th, 1983, by the Registrar of the Real Estate and Business Brokers Act wherein the Registrar seeks to revoke the registration of the Applicant for reasons that would disentitle the registrant to registration under section 6 of the Act if he were applying for registration. The Reasons of the Registrar are set out in the Proposal.

The first ground cited as a reason for revocation is that in view of the financial position of the Applicant, he cannot be expected to be financially responsible in the conduct of his business. The evidence called on behalf of the Registrar indicates that the Applicant was first registered as real estate salesman in 1978 notwithstanding his disclosure that there were several judgments outstanding against him. At the time of the registration, the Applicant indicated to the Registrar that he did not want to declare bankruptcy and that it was his intention either to have the judgments set aside by the various courts or to pay them in full. In his applications for renewal, Walton had declared that there were unpaid judgments recorded against him. However, he consistently neglected to respond to the Registrar's letters of February 9, 1981, March 27, 1981 and February 10, 1982 in respect of payment of such judgments.

On March 28, 1983, the Applicant, Mr. Walton, was interviewed by a Ministry investigator and that interview revealed an indebtedness of approximately \$100,000.00

consisting of registered judgments, interest on such judgments and repayments owing of "drawings" to Simcoe Real Estate Ltd. There were discussions between the Ministry and the Applicant as to a notice of settlement to pay the debts; nothing materialized as to payment.

The current Registrar, Mr. Coleclough, testified with respect to his opinion of the Applicant's intention and ability to pay his debts. The Registrar indicated that he was continuously seeking evidence from the Applicant that he was serious about payment to his creditors but he could never find such evidence. The Registrar felt that Mr. Walton was dishonest in that he never does what he promises to do and is a perpetual "hard luck story". Mr. Coleclough drew the conclusion that Mr. Walton did not declare bankruptcy, not out of concern for his creditors, but out of concern as to his own ability to borrow.

In addition to Mr. Walton's history of financial difficulty, the Registrar became apprised of a real estate transaction which it alleges in the Proposal to revoke demonstrates Mr. Walton to be irresponsible and less than as honest as he is required to be in his real estate dealings. In 1981 Mr. Walton submitted an offer to purchase a property listed by his employer. At the time of the submission of the offer, the Applicant disclosed to the vendors that he was a real estate salesman and broker. The vendor accepted an unconditional offer by Walton. The transaction aborted on the closing date, and the McKendrys who had believed they had a firm and binding offer and had purchased another property on the security of their own "sale" obtained a judgment for damages. Mr. McKendry testified as to the hardship occasioned to him and his wife by Mr. Walton's conduct.

Testifying on his own behalf, Mr. Walton firstly drew attention to the fact that the substantial portion owing as to judgments was incurred in his previous career in patent work and a most unfortunate dealing with one particular client. He resolutely indicated to the Tribunal that he intended to make some satisfactory arrangement as to the payment of his debts, but he has been consistently thwarted by "bad luck" in the last few years. As to the McKendry transaction, the Applicant felt that it was only the unforeseen drop in the real estate market which made his speculation seem reckless. Mr. Lewis, the employer of the Applicant, testified that the Applicant was intelligent, hard working and reminded the Tribunal of the perpetual cash flow problems inherent in the real estate business. Evidence was also given as to Mr. Walton's earnings in the business and that evidence was not impressive.

Upon reviewing all the evidence, the Tribunal finds that Mr. Walton's financial ills are chronic. The Act which the Registrar administers clearly indicates that one is not entitled to registration or if registered, that such registration should not continue, if having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business. We feel that Mr. Coleclough is compelled to issue his Notice Proposal in these circumstances and that since 1978 Mr. Walton had been treated very leniently by the Registrar. No more glaring example, however, can be given of Mr. Walton's situation leading to financial irresponsibility than Mr. Walton's behaviour toward the McKendrys.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act the Tribunal directs to Registrar to carry out his Proposal.

TRAVEL LINK INC.

APPEAL FROM A DECISION OF THE  
REGISTRAR UNDER THE TRAVEL INDUSTRY ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN  
BARBARA J. SHAND, MEMBER  
PETER BONCH, MEMBER

COUNSEL: A.N. MAJAINA, representing the Respondent

No one appearing for the Appellant

DATE OF HEARING: 26 September 1985 Toronto

#### REASONS FOR DECISION AND ORDER

On July 5, 1985, the Registrar, Travel Industry Act, the "Registrar") pursuant to Sections 4 and 5(2) of the Travel Industry Act, R.S.O. 1980, c.509, (the "Act") issued and served a combined Notice of Proposal to Revoke Registration and Order of Immediate Temporary Suspension of Registration (the "Notice of Proposal") on Travel Link Incorporated ("Travel Link") a travel agent registered under the said Act, and on Donna Green, the owner and sole director, officer and shareholder of Travel Link.

The Registrar's proposal to revoke the registration of Travel Link was based essentially upon two grounds - the apparent financial instability of Travel Link and the past conduct of Donna Green in failing to comply with requests of the Registrar to provide financial statements and other documents as required under the Act. Details of both grounds are fully set out in the Notice of Proposal.

Upon receipt of the Notice of Proposal, Ms. Green, as provided for in the Act, requested a hearing before the Commercial Registration Appeal Tribunal (the "Tribunal"), and on July 17, 1985, an Appointment for and Notice of Hearing was issued advising Travel Link and Ms. Green that a hearing would be held pursuant to Section 6(4) of the Act before the Tribunal on July 19, 1985.



The Appointment contained the following Notice:

"AND FURTHER TAKE NOTICE that, if you do not attend at the hearing, the Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings."

On July 19th, at the request of Travel Link and on consent of the Registrar, the matter was adjourned to July 25, 1985.

On July 25th, neither Ms. Green, nor any other representative on behalf of Travel Link appeared. The Tribunal once again, after hearing submissions on behalf of the Registrar, adjourned the matter sine die and ordered that the Order of Interim Suspension be extended until the hearing was concluded.

By Appointment for and Notice of Adjourned Hearing dated September 12, 1985, a new hearing date of September 27, 1985 was set. Again no one appeared on behalf of Travel Link. The Tribunal decided that the matter should proceed in the absence of Travel Link and called upon counsel for the Registrar to present his case.

Three witnesses were called on behalf of the Registrar.

R. O. Steed, an inspector designated by the Registrar, gave evidence both as to the apparent working capital deficiency and his lengthy correspondence with Ms. Green requesting the financial statements of Travel Link and/or evidence of infusion of capital. Mr. Steed's first report showing a working capital deficiency of \$18,372. and the conclusion that Travel Link "appears to pose threat to fund as at June 30/83", was dated December 23, 1983. A letter to Ms. Green dated October 1, 1984, stated that if the required financial statements were not received by October 31, 1984, Mr. Steed would request the Registrar to suspend the registration of Travel Link as a travel agent. Exhibits 19 and 20, dated October 1, 1984 and November 28, 1984 respectively, reported that the information previously demanded had not been received. Exhibit 20 stated that "the Registrar may wish to take further (sic) with this Registrant."

Mr. Steed could not unequivocally state what the financial position of Travel Link was at the time of the hearing because he had not seen any financial statements of that company subsequent to June 30, 1984. It was that unaudited statement which had shown the working capital deficiency previously referred to.

R. A. Baird, a financial officer of the Registrar, also gave evidence as to his unsuccessful attempts, which included numerous telephone calls and letters to obtain the financial statements from Travel Link and a meeting with Ms. Green.

Mr. Baird also prepared Exhibit 24 which was a file summary listing the telephone calls made to Ms. Green to set up a meeting to discuss the operation of Travel Link and a series of N.S.F. cheques issued by Travel Link to its suppliers of travel services, the first such cheque being dated June 25, 1984, the last dated June 10, 1985. These N.S.F. cheques were reported to the Registrar by the suppliers as required by the regulations under the Act.

None of the above evidence, given under oath, was challenged or refuted, and therefore must be taken as proven.

W. D. Smith, an investigator with the Investigation and Enforcement Branch of the Ministry of Consumer and Commercial Relations, gave evidence as to an alleged breach of the Immediate Temporary Suspension of Registration Order of the Registrar. In the Tribunal's opinion, the allegation was not proven and was not taken into account in reaching a decision.

The Tribunal finds that Travel Link and Donna Green have failed to provide the Registrar with financial statements and other statements relating to the current working assets and liabilities of Travel Link as required under the Act and regulations. The Tribunal also finds that the issuance of N.S.F. cheques and the apparent working capital deficiency is sufficient evidence at least to question the financial responsibility of Travel Link.

Ms. Green has not availed herself of the numerous opportunities given to her to discuss these problems with the officials in the Registrar's office prior to the suspension of the Travel Link certificate of registration. Nor has she appeared before this Tribunal to put forward her own position or to refute the allegations and conclusions drawn by the Registrar. Her flagrant disregard of the provisions of the Act and regulations, her repeated failure to answer letters and to attend meetings, arranged and rearranged to meet her convenience, show a pattern of, at best, irresponsibility, if not an outright determination not to provide pertinent information or comply with the law.

Section 4(1) of the Act reads in part as follows:

"4.-(1) An applicant is entitled to registration or renewal of registration as a travel agent or travel wholesaler by the Registrar except where,

(c) the applicant is a corporation and,

- (ii) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
- (iii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty;"

Section 5(2) of the Act reads:

" (2) Subject to section 6, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 4 if he were an applicant, or where the registrant is in breach of a term or condition of the registration."

Given the Tribunal's findings and conclusions and the provisions of the Act, the Tribunal is of the opinion that Travel Link and Donna Green cannot reasonably be expected to be financially responsible in the conduct of Travel Link's business and that the past and continuing conduct of Donna Green, as sole officer and director of Travel Link affords reasonable grounds for belief that the business of Travel Link will not be carried out in accordance with law and with integrity and honesty.

The Registrar's proposal is therefore upheld and the Tribunal, by virtue of the authority vested in it, orders and directs the Registrar to carry out his proposal to revoke the registration of Travel Link.

WAYNE R. BROWN et al  
 (as listed in Appendices "A", "B", and "C"  
 to the Appointment for and Notice of Meeting)

IN RE: PROFESSIONAL SEMINAR CONSULTANTS LTD. and  
 ASSOCIATED BUILDING INDUSTRY OF NORTHERN CALIFORNIA,  
 MEDICAL SOCIETY OF SANTA BARBARA COUNTY and  
 ALAMEDA COUNTY DENTAL SOCIETY

MEETING TO DETERMINE, IN GENERAL, THE METHOD OF  
 DISPOSITION OF CERTAIN ADJOURNED HEARINGS AND,  
 WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, IN  
 PARTICULAR, TO CONSIDER THE CONTINUATION OF THE SAID  
 HEARINGS IN WRITING

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN  
 WATSON W. EVANS, MEMBER  
 MARGARET DONALD, MEMBER

COUNSEL: SAMUEL R. RICKETT with JOHN B. HAMILTON, Q.C.  
 representing the Appellants

MICHAEL D. LIPTON, Q.C. with HOWARD GREENBERG  
 representing the Respondent

DATE OF  
 MEETING: 15 January 1985 Toronto

#### REASONS FOR RULING

The Tribunal finds that there is no absolute stated  
 requirement that the hearing before the Commercial Registration  
 Appeal Tribunal be "oral". To paraphrase Section 10 of the  
 Statutory Powers Procedure Act, what is required is full and  
 fair disclosure of the facts upon which the claim is based.  
 Whatever method is used, the onus is upon the claimant to prove  
 the claim.

There is no doubt that the Board of Trustees is as  
 entitled to natural justice as is any claimant appearing before  
 the Tribunal.

However, the Tribunal is unable to discern, upon a  
 consideration of the total circumstances of these claims made,  
 how the Board would be prejudiced by a continuance of the  
 adjourned hearing in writing.

The Tribunal must also give consideration to the submission that insistence upon the personal appearance and testimony of claimants in the circumstances would have the effect of denying to the claimants the opportunity of presenting their claims for consideration by the Tribunal and in effect a review of the negative decision of the Board, i.e. denying to the claimant a "hearing".

The Tribunal has available to it in all the claims, the general evidence placed before it. It has the benefit of its own determination of fundamental issues which in all likelihood were of concern to the Board, and very effectively placed before the Tribunal by its counsel.

The reasons for the decisions made by the Tribunal in other claims indicate a format designated in part "sequential events" which relate to the particular facts of individual claims upon which the specific claims were dealt with.

The Tribunal rules that the hearing in the instance of one claimant out of each of Appendices "A" "B" and "C" (to be designated by counsel for the Appellants to the Registrar within 20 days hereof and to form part of this Ruling) be proceeded with by affidavit evidence and submissions in writing/orally by counsel, and that the remainder of the hearings be continued to be adjourned sine die to a date to be designated by the Registrar.

## APPENDIX MARKED 'A'

TO THE RULING OF  
THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

Wayne R. Brown  
Mr. and Mrs. Karney Barberian  
Kathie Botieff-Carniglia  
Anita and William Botieff  
Robert P. Bruce  
Frances Finch  
Edward and Alice Gabrielson  
Mr. and Mrs. Gordon W. Hanson  
Robert and Sarah Hall  
Bruce G. Huntley  
Walter Harrington and Alexander Kulakoff  
Charles I. Joens  
Fay G. Koretoff  
Mr. and Mrs. Harold J. Kreutz  
Lloyd and Elizabeth Klein  
Elwood J. Leep  
John and Jeane Lane  
Bradford D. Melton  
Lee Marsh  
Byrl D. Phelps  
Ned K. Ryder  
Edward P. Schwafel Engineer Inc.  
Mr. and Mrs. Willis G. Schoemaker  
J. Boyd Stout  
Walter and Zula Springs  
Robert E. Towne  
Carol Rexroth  
James W. Williams  
Jack Webb  
Paul Baldacci, Jr.  
Mr. and Mrs. Thomas J. Callan, Jr.  
W. Edgar Jessup, Jr.  
Paul and Edwina McDowell  
Donald R. Wick



## APPENDIX MARKED 'B'

TO THE RULING OF  
THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

John R. Almklov  
Eugene Mironoff  
Oscar Auerback  
Benjamin B. Banaag  
Harry B. Braun  
Alfred V. Bateman  
Dr. and Mrs. Stephen L. Bland  
William Durnin  
Mr. and Mrs. William J. Davenport  
Joseph M. Farber  
Rita Galligan  
E. A. Hackie  
Edward E. Hildebrand  
Mrs. Letarcia G. Hunt  
Nathan Jacobs  
Donald E. King  
Norton Kolomeyer  
Mr. and Mrs. Harper C. Lowe  
Lois L. Schwartz  
Victor J. Slominski  
Dr. and Mrs. Carl Leong  
Robert C. Marshall  
John D. Meschuk  
Helen McClary  
Robert M. du Roy  
Marvin Rechter  
William J. Tibbs  
Frank S. Vigil  
Frank E. Weagant

APPENDIX MARKED 'C'

TO THE RULING OF  
THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

Stanley and Laverne Krotz  
Dr. Russell R. Langenbeck  
Dr. and Mrs. Dan W. Peterson

## WENTWORTH CONDOMINIUM CORPORATION NO. 45

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN  
MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN  
D.H. MACFARLANE, MEMBER

COUNSEL: J.M. REESOR, representing the Appellant  
BRIAN M. CAMPBELL, representing the Respondent

DATE OF  
MEETING: 28 February 1985

Toronto

REASONS FOR RULING

Wentworth Condominium Corporation No. 45 made a claim for damages based on a breach of warranty because of a major structural defect.

This meeting of the Tribunal has become concerned with determination of a preliminary issue of whether the claim was barred by reason of the time of being made, i.e. after expiry of the warranty.

Relevant provisions respecting time as related to warranties are:

ONTARIO NEW HOME WARRANTIES PLAN ACT

Sec.1 "In this Act,  
...

(i) 'prescribed' means prescribed by the regulations;"

Sec.13(3) "The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for his possession and the warranties take effect from the date specified in the certificate."

Sec. 13(4) "A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed."

...

Sec. 14(1) "Where,

...

(c) "the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed."

Sec.15 "For the purposes of sections 13 and 14, a condominium corporation shall be deemed to be the owner of the common elements of the condominium and the warranties take effect on the date of the registration of the declaration and description."

(emphasis throughout is Tribunal's)

Reg. 726, Part I

Sec. 1(h) "'date of possession' means the date on which the home is completed for possession by an owner as specified in the applicable certificate of completion and possession;

(i) "'date of registration' means the date on which the declaration and description required by the Condominium Act are registered in the proper land registry office in respect of a condominium project."

Reg. 726, Part II  
Sec.2. 3(2)

"In the case of any condominium project, the vendor shall similiarly complete and execute the form of certificate of completion and possession required by the Corporation for the common elements, setting forth the date of registration, identifying any surface defects in workmanship and materials in respect of the common elements accepted by the condominium corporation and listing any unfinished work required in connection with the common elements."

The Condominium was enrolled under the Ontario New Home Warranties Plan Act 1976.

On the 21st November 1977, the Ontario New Home Warranty Program was advised on the Program form, which reads (in part):

"...

"As soon as the Condominium Corporation is registered under the Condominium Act we require you to supply us with the following information; this is to ensure that the necessary Warranty Certificate is issued for the Common Elements.

"1. Date of Registration: March 16, 1977  
[Date was inserted]

"...

"On registration the Certificate of Completion and Possession covering the Common Elements must be completed forthwith...."

A Certificate of Completion and Possession in respect of 'Common Elements' was filed.

is blank. On the face page, the Date of Possession particular

On the reverse,

'Builder Certificate' states (in part):

- "1. The home described on the face hereof is substantially completed and is ready for possession by the Purchaser(s) on the date of possession indicated on the face hereof subject only to the completion of seasonal work and items of a minor nature more particularly described on the face hereof.
- "2. The Builder will grant possession of the home to the Purchaser(s) on such date of possession and the Warranty Certificate to be issued by HUDAC New Home Warranty Program will be effective from that date."

'Purchaser Certificate' states (in part):

- "1. The Purchaser(s) has/have inspected the home described on the face hereof and such home is substantially completed and is ready for possession by the Purchaser(s) on the date of possession indicated on the face hereof subject only to completion by the Builder of seasonal work and items of a minor nature more particularly described on the face hereof.
- "2. ...
- "3. The Purchaser(s) is/are aware that the home has the benefit of the warranties contained in a Warranty Certificate to be issued by HUDAC New Home Warranty Program effective the date of possession and



accept(s) such warranties by way of supplement to and extension of any express written warranties, representations and conditions heretofore given by the Builder but in lieu of all other warranties, representations and conditions, express or implied, statutory or otherwise, including, without limitation, any implied warranty of quality or fitness, and covenant(s) and agree(s) to fulfill the obligations of the Purchaser(s) set forth in such Warranty Certificate."

Each certificate is dated December 20th, 1977.

The Certificate of Completion and Possession appears to be the same form as is used in respect of a home.

By letter of February 6th, 1978, Wentworth Condominium was advised:

"...

"Attached is your Warranty Certificate, showing that the commencement date of the 5 year warranty is December 20, 1977. This Certificate is an important document."

In the Warranty Certificate the only reference to date is in the particular:

"DATE OF POSSESSION DECEMBER 20, 1977 "  
[Date was inserted by Program

In fine print at right bottom of front page, there is stated:

"B Where, pursuant to section 14 of the Act,

"(a) ...

"(b) the Owner suffers damage because of a major structural defect and the claim is made by written notice to the Corporation after expiration of

the foregoing warranties and by the  
fifth anniversary of the date of  
possession,

..."

The Tribunal finds:

A. That the (mis)statements:

- (a) in the letter of February 6, 1978 that "the commencement date of the 5 year warranty is December 20, 1977" and
- (b) in the warranty certificate that the warranty can be the basis of a claim "by the fifth anniversary of the date of possession," (i.e. by December 20th, 1982)

are the responsibility of the Respondent.

- B. That the Appellant relied on the statement and did not submit a claim until September 22nd, 1982, i.e. beyond 5 years after the date of registration (16 March 1982).
- C. The Appellant suffered a detriment by being deprived of mailing a claim prior to the 5 years after the registration.
- D. The Program induced the Applicant to believe that a claim could be filed by December 20, 1982.

The Program's position is set out in a letter dated the 6th day of December 1984:

"...Section 15 of the Ontario New Home Warranties Plan Act states that the warranties (on common elements) take effect on the date of registration of the declaration and description. Therefore, the warranty covering the common elements of W.C.C.#45 commenced March 16, 1977, not December 20, 1977. Since the warranty covers valid Major Structural Defects for a five year period only, the warranty for W.C.C.#45 expired March 16, 1982, prior to the claim letter dated September 22, 1982 submitted...

"Take notice therefore that the Warranty Program hereby further denies your claim on the grounds that it was not submitted within the proper time limits set by Section 14(1)(C) of the Ontario New Home Warranties Plan Act."

The Appellant's position in a letter of 21st day of December 1984 refers to:

"....the warranty certificate issued by our program covering the common elements of the condominium corporation. This warranty expressly states that the commencement date of the five year warranty is December 20th, 1977. This warranty certificate was issued by your program based on the information that was available to it at the time."

and submits:

"...it is legally binding and enforceable in accordance with the provisions of the Act. If a mistake was made by the program at that time...this is of little relevance."

The Appellant submits that the Respondent is estopped from reliance upon section 15 of the Act and is bound by the warranty as issued by it including the period thereof of 5 years from 20 December 1977 so that the claim was made within the life of the warranty and before the expiry.

In support the Appellant cites Robertson v. Minister of Pensions (1949) 1 K.B. 227 wherein a serving army officer, wrote to the Director of Personal Services at the War office regarding a disability of his and received a reply from the Director stating: "Your case has been duly considered and your disability has been accepted as attributable to military service". Neither the Minister of Pensions nor anyone in his department had been consulted. Relying on that assurance the officer forebore to obtain an independent medical opinion on his own behalf. The Minister of Pensions later decided that the appellant's disability was not attributable to war service

The applicable Royal Warrant provided:

"4. CONDITIONS FOR DISABILITY AWARDS. - A member of the military forces who is...certified to be disabled in consequence of a disability attributable to military service during the war, may be granted a disability award..."

"2(4) 'Certified' shall mean....certified by a medical officer or board of medical officers appointed or recognized for the purposes by the Minister [of Pensions]."

It is noted that the certificate had not been made in accordance with the terms of the warrant; the Director had not been appointed or recognized by the Minister of Pensions.

Denning J. stated at page 231:

"The case falls within the principle that if a man gives a promise or assurance which he intends to be binding on him, and to be acted on by the person to whom it is given then, once it is acted upon he is bound by it."

and

"The next question is whether the assurance in the War Office letter is binding on the Crown. The Crown cannot escape by saying that estoppels do not bind the Crown for that doctrine has long been exploded."

and at page 232:

"In my opinion if a government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know and cannot be expected to know the limits of its authority. The department itself is clearly bound...."

The Tribunal notes that in the Robertson case the certificate was held binding not only on the department issuing it but even beyond that - binding on another department, that specified in the Warrant.

The Program has relied on Maritime Electric Co. v. General Dairies Ltd. [1937] 1 D.L.R. 609 where it was held that where a statutory obligation of an unconditional character exists, estoppel is not allowed to defeat the obligation. A public utility company which, by mistake in computing the amount of electricity supplied to a consumer, charged and collected less than the rate it was authorized to make and exact under the Public Utilities Act may recover the amount of the undercharge even though the consumer acting upon the said statements so rendered believing the same to be true had adjusted the cost of his product (downward) and paid out to the farmers and others large sums of money more than they would or could have paid if the amounts claimed for electric energy had been rendered to and claimed at the several times when the said statements were rendered.

Section 16 of the Public Utilities Act provided:

"No public utility shall charge, demand, collect or receive....less compensation for any service than is prescribed."

and such charge was prohibited by section 8 of that Act;

Section 19 provided that:

"...no person, firm or corporation shall knowingly solicit, accept or receive any rebate, concession or discrimination in respect to any service...whereby any such service is by any device whatsoever, or otherwise, rendered...at a less rate than that named in the schedules in force as provided herein...."

Lord Maugham stated at page 613:

"The specific question for determination here is can the duty so cast by statute upon both parties to this action be defeated or avoided by a mere mistake...."

In the view of their Lordships the answer to this question in the case of such a statute as is now under consideration must be in the negative. The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense. In such a case - and their Lordships do not propose to express any opinions as to the statutes which are not within this category - where as here the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, [i.e. recover back charges] it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence, which under certain special circumstances can be invoked by a party to an action; it cannot therefore avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law. To hold, as the Supreme Court has done, that in such a case estoppel is not precluded, since if it is admitted, the statute is not evaded, appears to their Lordships with respect to approach the problem from the wrong direction; the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision."

The Program further relied upon The Queen in Right of Ontario v. Baig 23 O.R.(2d) 730 where the Crown was held entitled to recover from a person not eligible under provisions of the Statute, a statutory grant provided for in the Ontario Home Buyers Grant Act. This grant was paid under the mistaken impression that the recipient was both qualified and entitled to receive it. The basis of the receipt of the grant was the



completion of a form sent by the Crown open to interpretation that the recipient was entitled. The form had in part a particularizing which led the recipient to a belief that he was entitled to the grant even though he was disentitled by the generalization in the same form which was in the words of the statute.

The Tribunal notes that in this case FitzGerald, D.C.J. found (p.733):

"...no detriment suffered such as is required to bring the doctrine of estoppel into operation."

In respect of estoppel the Judge said:

"...the respondent is faced with the fundamental principle that estoppel does not operate against the Crown."

He did set out the difference:

"While there is a modern reluctance to let the Royal prerogative mask obvious injustice and to protect the weak from the power of the Crown, this tendency seems to have been confined to cases where the Crown was an actual participant in the conduct which induced the person affected to change his position to his detriment."

He accepted as:

"One of the leading examples of estoppel operating against the Crown is the English case Robertson v. Minister of Pensions..."

[The headnote states that the Judge distinguished that case.]

It is to be noted that in Maritime Electric Co. v. General Dairies Ltd. and in The Queen in Right of Ontario v. Baig, and in Re: Harris and Ministry of Community and Social Services 1975 (O.R.) 2nd (referred to therein) there was in question the recovery of money to which there was no entitlement and an obligation (on the part of the authority) to recover.

In this matter to uphold the position of the Program would be depriving/nullifying that to which the Appellant was entitled, though it was faultless, to its detriment.

The Tribunal is of the opinion that the facts herein fall squarely within the principles enunciated in Robertson v. Minister of Pensions.

The Tribunal rules that the Respondent is estopped from relying upon section 15 of the Act, and from maintaining that the warranty had expired when the claim was made.

The Tribunal rules that the claim is not barred by reason of not having been made prior to March 16, 1982 and that the warranty was still valid and in effect when the claim was made.

\* Note: The above ruling was appealed to the Supreme Court of Ontario (Divisional Court) by the Ontario New Home Warranty Program. The appeal had not been concluded at the time of this publication.

YORK CONDOMINIUM NO. 297

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN  
HELEN J. MORNINGSTAR, MEMBER  
D.H. MACFARLANE, MEMBER

COUNSEL: B. BARUCH SOOKMAN, representing the Appellant  
BRIAN CAMPBELL, representing the Respondent

DATE OF  
HEARING: 26 November 1984 Toronto

#### REASONS FOR RULING

The Appellant, York Condominium No. 297 has brought a appeal from the Respondent's decision which was set out in its decision letter to be found in Exhibit 5 at Tab 4. The decision was that certain problems in respect of which relief was sought were not warranted in that they were not major structural defects. A major structural defect as defined would have been a defect in workmanship or materials and the alleged defect or defects in question were deemed to have been design defects and therefore not covered. That was the decision from which the Appellant appealed.

However, at the hearing counsel for the Respondent advanced an initial objection that the warranty provided by the Statute did not exist in the case of the Appellant and that the reasons given in the decision letter were therefore irrelevant.

It was that objection by counsel for the Respondent to which the Appellant took issue and to which the Tribunal's deliberations at this hearing have been addressed.

The Tribunal is satisfied that the Ontario New Home Warranty Plan Act came into force and took effect upon December 31st, 1976. In this case the condominium corporation which is the Appellant was registered (in accordance with the proper provisions of law) on December 30th, 1976 - one day earlier.

The Tribunal holds that the Ontario New Home Warranties Plan Act is not retroactive in its application and that, notwithstanding a splendidly constructed argument to the contrary advanced on behalf of the Appellant, it therefore did not apply to the benefit of the Appellant who therefore had no status to seek relief pursuant to it.

The Statute provides for the making of by-laws whereby warranties in addition to those provided by it may be specified.

In this case the Appellant was asserting a claim or claims relating to the common elements of the condominium. Such common elements are deemed to belong to the condominium corporation rather than the owner or owners of any individual condominium dwelling unit.

But the Appellant, the condominium corporation, is not covered by the warranty provided by the Statute. This is because it has never taken the prescribed steps to avail itself of the benefit of such warranty, the same being bestowed in the finding of this Tribunal at By-law 16(2) of Regulation 726 under the Ontario New Home Warranties Plan Act which sets out what are called Transitional Rules and which reads as follows:

(2) Any vendor may, at his option, apply to the Registrar pursuant to the provisions of section 8 for enrolment in the Plan of the common elements of any condominium project that includes unsold homes and the date of registration for which has occurred prior to the 31st day of December, 1976.

The Tribunal holds that compliance with the said By-law would have been the only means whereby the Appellant could have gained or attained the necessary status to succeed in its appeal or even to bring the same before this Tribunal.

The Tribunal adopts the reasons set out in its former decision in the case of Re: Halton Condominium Corporation #41 (1982) 11 C.R.A.T. p.104, insofar as they apply to this case which they do in substantial measure.

Accordingly by virtue of the general authority vested in it, the Tribunal rules that there is no entitlement by the Appellant to a hearing under Section 16(2) of the Act.









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# Commercial Registration Appeal Tribunal



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Summaries of Decisions

Volume 15 (1986)



Ontario

COMMERCIAL REGISTRATION APPEAL TRIBUNAL  
SUMMARIES OF DECISIONS \* - VOLUME 15  
CITED 1986 15 C.R.A.T.

\* This volume contains in some instances full decisions and reasons given, and in others summaries only. If reference to the exact decision is desired, application should be made to the Registrar.

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

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B-T PROVISIONERS LIMITED  
(CLUB GRILL RESTAURANT)

APPEAL FROM THE DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE DINING LOUNGE  
LICENCE AND TO AUTOMATICALLY REVOKE IF THERE IS A  
FAILURE TO COMPLY BY OCTOBER 15th, 1985

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING  
BARBARA J. SHAND, MEMBER  
RONALD W. CHEMIJ, MEMBER

APPEARANCES:

S.A. GRANNUM, representing the Liquor Licence Board

No one appearing for the Applicant

DATE OF  
HEARING: 24 April 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by B-T Provisioners Limited, the licensee of Club Grill Restaurant, 33 Kingston Street, North York, Ontario, from the Decision of the Liquor Licence Board of Ontario dated the 10th day of September, 1985, revoking the liquor licence of the Applicant provided the Applicant had not paid arrears of sales tax owing to the Province of Ontario by the 15th day of October, 1985.

A Notice of Proposal was originally issued on May 15th, 1985, whereby the Liquor Licence Board proposed to revoke the liquor licence of the Applicant pursuant to section 10(3) of the Liquor Licence Act because in the wording of the Proposal the Board were of the opinion that the licensee holder was not entitled to a liquor licence owing regard to its financial position, and it could not be reasonably expected to be financially responsible in the conduct of its business in that it had failed to remit sales tax in the amount of \$5,010.40 to the Ministry of Revenue.



The Licensee requested a hearing before the Liquor Licence Board and the hearing was held on the 10th day of September, 1985. At that time, the Decision of the Liquor Licence Board was that the Licensee shall remit all outstanding monies to the Retail Sales Tax Branch of the Ministry of Revenue on or before October 15th, 1985, and in the event the Licensee fails to comply with the term and condition, the licence will be automatically revoked as of October 16th, 1985.

Counsel for the Board called as a witness this morning Mr. Mervin Moscrop, Supervisor of the Provincial Sales Tax office, who confirmed that the arrears of sales tax have not been paid in accordance with the Decision of the Liquor Licence Board and that the current arrears to date are \$21,202.70. Mr. Moscrop also confirmed that no returns had been filed for the months of January, February and March of 1986 and that an attempt to garnishee the bank account of the Applicant on December 31st, 1985, proved ineffective.

Notice of this hearing was properly served on the Applicant and the necessary affidavits of service have been filed. The Applicant has not appeared this morning to proceed with its appeal and is not represented.

The Tribunal finds that on the basis of the evidence placed before it, the Licensee is in default of payment of retail sales tax in the amount of \$21,202.70 and that the Licensee cannot reasonably be expected to be financially responsible in the conduct of its business.

The Tribunal therefore confirms the Decision of the Liquor Licence Board dated the 10th day of September, 1985, and authorizes the Board to revoke the liquor licence of the Licensee for the said premises forthwith.

553 CHURCH STREET CAFE LIMITED

APPEAL FROM THE DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO ISSUE A DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
ROBERT COWAN, MEMBER

APPEARANCES:

MARK L.J. EDWARDS, representing the Applicant

FERNAND DOUCET, a party, appearing on his own behalf

W. GEORGE KERWIN, a party  
appearing on his own behalf and as  
President of Monteith Homeowners Association

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 27 May 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by 553 Church Street Cafe Limited from the Decision of the Liquor Licence Board of Ontario dated the 5th day of December, 1985, whereby the Board refused to issue a Dining Lounge Licence to the Applicant for the premises known as "553 Church Street Cafe" in the City of Toronto.

The Applicant submitted an application to the Liquor Licence Board on the 15th day of June, 1985, and a public meeting was held by the Board on the 10th day of September, 1985, to consider the application. The Board issued a Notice of Proposal on the 9th day of October, 1985, whereby it proposed to refuse to issue the said Dining Lounge Licence and the Applicant requested a formal hearing before the Board pursuant to Section 11(3) of the Liquor Licence Act. A hearing was held before the Board on the 5th day of December, 1985, and the Board, in its Decision on that date, refused to issue a Dining Lounge Licence to the Applicant.

The first witness called on behalf of the Liquor Licence Board was Fernand Doucet who resides at 2 Monteith Street and whose property adjoins the rear of the Licensee's

property at 553 Church Street. The witness filed as an Exhibit a letter, petition and map. The said letter and petition contained 149 signatures in opposition to the application for the licence and the witness stated that 146 of the persons who signed the said petition resided within a radius of 100 meters of the Applicant's property. The map attached to the said Exhibit illustrated the residential properties in the neighbourhood in red and the witness confirmed that the great majority of the properties in the immediate neighbourhood were residential. The witness had prepared the petition for circulation and the main objections of the petitioners to the licencing of the Applicant's establishment were as follows:

- (a) The undesirable noise generated by the late night operation of this type of business in a relatively quiet neighbourhood.
- (b) The attraction of a late night clientele which, according to both the owner and the manager of the establishment, will require a bouncer at the door to screen out unwanted customers.
- (c) The great increase of traffic in an already congested area where public parking is virtually non-existent after 10:00 p.m.
- (d) The congestion in the surrounding streets which could seriously hamper any emergency action required by the police or the fire department.
- (e) The fact that this type of business in this neighbourhood is not needed, nor wanted and is unacceptable to the residents.

The witness testified that his major concern was with respect to the noise that would be generated. He stated that the Applicant had testified in previous hearings that they would have a bouncer at the door of the premises to screen out undesirables and this created concern on the part of the witness as to what would happen to the undesirables if they were refused admission. The witness referred to an Appendix to the Exhibit which had been filed by him and which appeared to

be a flyer distributed by the Applicant indicating that the premises would be open seven days a week and would serve cafe fare from 10:00 p.m. to 4:00 a.m. nightly. The witness testified that on April 6 of this year, he had called the police at 2:30 a.m. and again at 2:50 a.m. because of excessive noise coming from the Applicant's premises and that more recently, there had been a noise problem at 3:00 a.m., which noise was emanating from the kitchen and was the sound of dishes being washed. He stated that his windows were open because of the warm weather and that the back door to the kitchen of the cafe is kept open most of the time during the warmer weather. The witness confirmed that he had circulated an original petition which was filed with the Liquor Licence Board and dated September 4, 1985 and had obtained the signatures on the said petition. The witness also referred to problems with a fire door opening on a catwalk at the rear of the restaurant.

On cross-examination, the witness confirmed that he had had a discussion with the owners with respect to the disco and that they had agreed that they would not have a disco on the third floor of the premises. The owners had wanted to know the nature of the complaints of the residents of the area and the witness stated that the owners appeared prepared to listen to their complaints and had indicated co-operation. The witness stated that the majority of the people within the immediate area of the Applicant's premises were concerned with the noise problem, but that the parking and late night clientele were the concern of the larger area as well as to the immediate neighbours. He confirmed that the owners had indicated that they would post warning signs within the premises advising that Monteith Street is a tow-away area. He also expressed his concern that the premises would have need for a bouncer. He stated that the other problem in the area is the prostitution problem north of Wellesley Street, but there had been a big improvement in the last six months. When questioned, the witness stated that he knew that the Applicant's premises would cater to the gay community but he stated that many gays who lived in the area were opposed to the granting of the licence and had signed his petition. The witness stated that he was not bothered by the gay community. The witness stated that he did not agree that there was no hard evidence that the late night crowd would create a nuisance and that the existence of a bouncer might alleviate any problem outside the premises but would create a further problem outside the premises when these people are refused admission. He stated that the music emanating from the premises created problems, especially the thumping of the bass. He confirmed

that he had been advised that steps had been taken to soundproof the premises but that the problems had not been solved. The witness stated that there was a vibration problem in addition to the noise problem and that there had been no solution to the noise problem since the prior hearing.

The next witness called on behalf of the Board was George Kerwin, who resides at 20 Monteith Street and is the Chairman of the Monteith Homeowners Association. He stated that the majority of the premises within 100 meters of the Applicant's restaurant are residential and that the noise from the restaurant could be heard as far as 150 meters. He stated that he was very concerned about the late hours of operation and he also referred to the flyer indicating that the premises would be open until 4:00 a.m. The witness stated that the residents in the area, including the members of his Association, were still concerned about noise from the premises, traffic and the noise from patrons leaving the premises at a late hour. He stated that the gay question was not an issue and was not relevant and he had no prejudice with respect to sexual orientation. He stated that soundproofing does not do much when the doors to the premises are left open.

On cross-examination, the witness confirmed that he had made no personal complaints with respect to noise and he confirmed that in his meeting with Mr. Hilton, the President of the Applicant corporation, he had been told that they would be prepared to do whatever soundproofing is necessary.

The next witness called on behalf of the Liquor Licence Board was Mark Skypas who had been an Investigator with the Board for approximately five years. He stated that there is no restriction on the hours of operation for a dining lounge licensee and that they are only required to cease the sale of liquor at 1:00 a.m. He stated that he had made an inspection of the premises and found the first floor to be a bona fide restaurant with the second floor consisting of a lounge with sofas and coffee tables together with the potential for a wet bar. He stated that the third floor was a disco but that things were very quiet when he left at 12:15 a.m. The witness stated that in conversation with the disc jockey, he was told that things got going after the other places closed.

The next witness called was Elvin Martin who was the City of Toronto Alderman for Ward 6 and the Applicant's premises are situated within his Ward. He stated that this was a common problem in that it was difficult to locate late night entertainment establishments which would be compatible with the



uses of the area. He stated that this area was a unique mixture of low rise and high rise and that there was little commercial activity north of Wellesley Street after 11:00 p.m. He stated that he was of the opinion that the granting of a licence to the Applicant in this mainly residential area would alter the character of the neighbourhood and that problems arise even if an establishment is well run. He stated that patrons leaving this type of establishment create noise which disturbs the residents and creates problems of compatibility of use. He stated that the municipality was attempting to redefine areas for late night uses as proposed by the Applicant. He stated that once an Applicant received a liquor licence, it was very difficult to control the use and the municipality had no authority to control the hours of operation. He stated that he felt that it was necessary to intervene on a liquor application at the time of the application rather than attempt to respond to complaints after a licence had been issued. He felt that this was a question of public interest and that the issuing of the licence was not in the public interest. On cross-examination, the witness confirmed his concern with respect to the disco and he confirmed that he had made no canvas of the area other than in the immediate Monteith and Gloucester Street area.

The next witness called on behalf of the Board was Jean de Boerr who resides at 4 Monteith Street, immediately beside Mr. Doucet. She confirmed that a great deal of noise came from the dances at the community centre at 519 Church Street and that she had often complained about this noise. She stated that there was a great deal of noise from the Applicant's premises at 553 Church Street and that because of the noise, she was unable to sit on the deck at the rear of her premises. She stated that her deck was approximately 24 feet from the fire escape at the rear of the Applicant's premises and she also stated that, in addition to the noise problem, she was bothered by the smell of food from the restaurant. She stated that the noise from the dance floor is a concern to her and that it was hard for her to sleep. She stated that she had lived at this location for 20 years and wanted to be able to have the right to quiet enjoyment of her home.

On cross-examination, the witness confirmed that she had not made any complaints about the noise but stated that she had not complained because Mr. Doucet, her neighbour, had already complained to the authorities.

The last witness called on behalf of the Board was William Copps who resides at 22 Monteith Street. He stated that he had not been bothered by noise emanating from the



premises but that when the property had been previously operated as an illegal "booze can" with people leaving as late as 5:00 a.m., the patrons leaving at these late hours always created problems. On cross-examination, he acknowledged that he had no reason to believe that the present owners would break the law. He stated that he had not been involved in meetings with Mr. Doucet and Mr. Kerwin. He confirmed that the community centre at 519 Church Street is a nuisance but that the fact that it closes at 1:00 a.m. made a difference to him.

The first witness called on behalf of the Applicant was Peter Bochove who is the Manager of the Applicant's premises at 553 Church Street. He had had previous experience for approximately nine years as manager of several establishments in Toronto and stated he had had no problems with respect to his operation of the prior establishments and had had no previous liquor violations. He described to the Tribunal the details of the operation and particulars of the menus together with the particulars of the types of customers who attended at the premises. He confirmed that consulting engineers had been retained with respect to the soundproofing problems and that further soundproofing was to be done to the premises. He stated that a ventilation fan had been installed and that it was one source of noise. He confirmed the need for aouncer together with a doorman in order to check proof of age and to escort out any undesirable patrons. He stated that in his meetings with the area residents, they had discussed the premises as a potential haven for prostitutes and the insulation problems and he confirmed that at the second meeting, the concerns of the residents were apparently not alleviated. He stated that he attempted to address the concerns by installing additional sound insulation and to encourage the patrons not to park on Monteith Street. He stated that there had been no complaints from the police with respect to congestion in the surrounding streets. The witness filed a petition containing 562 signatures, together with a map of the area and he stated that the petition had been obtained from patrons signing the petition in the cafe. The witness testified that 320 of the persons who signed the petition lived within the area from Yonge Street to Jarvis Street, and from Isabella Street to Carlton Street.

On cross-examination, the witness confirmed that he had been convicted of the operation of an illegal "booze can" operation at 553 Church Street, and he confirmed that some of the signatories to the petition were from outside Toronto. He also confirmed that none of the petitioners in support of the application for the liquor licence resided within 100 meters of

the restaurant. The witness confirmed that there was only a kitchen on the first floor and that it would be necessary to carry food to the second and third floors, but that food would be available on all three floors. He stated that he would have no concern with respect to compliance with the food/liquor ratio as required by the Liquor Licence Act and that the bulk of food sales would occur between 2:00 a.m. and 4:00 a.m.

The next witness called on behalf of the Applicant was Peter Maloney, a lawyer practising in the area who had known the prior witness since 1973. He stated that he had been able to observe various establishments managed by Mr. Bochove and he considered him to be a good bar manager who was able to control bad elements in difficult situations. He stated that he had been to the Applicant's premises once or twice a week for some considerable period of time and that it is a small place which is tastefully decorated.

The next witness called on behalf of the Applicant was George Hislop who identified himself as a leader in the homosexual community. He stated that he was a shareholder in Crispin's Restaurant and the Selby Hotel, both licensed premises, and that he had known Mr. Bochove for 15 years in his capacity as a restaurant and dining lounge manager, and that in his opinion, Mr. Bochove had had no management problems. The witness described the type of clientele who would attend the premises and he indicated that between 11:00 p.m. and 2:00 a.m., the patrons would be mainly people in the hospitality business who were spending some of their own time at this location. He stated that the area from Bloor Street to Carlton Street and from Bay Street to the Don River was the greatest concentration of gays in Canada, and he stated that there were only 18 licensed establishments in Toronto catering to gays.

On cross-examination, in reply to a question as to why many gays had signed the petition in opposition to the granting of a licence, he stated that the statements contained in the petition were prejudgmental. He confirmed that there is no shortage of licensed establishments within the immediate area but that persons might not choose to go to these other places. He confirmed his understanding that the big problems are the question of sound and noise level and the hours of late closing. He acknowledged that he would be as concerned as the neighbours who lived only 24 feet away if he resided at this location.

The last witness called on behalf of the Applicant was Roy Hilton, the owner of 553 Church Street Cafe Limited. He stated that he was a real estate appraiser who had purchased

553 Church Street as an investment and that when a prior tenant had vacated, the property had been empty for approximately a year. He had then leased the building to Mr. Bochove, but when he discovered that it was being used as an illegal "booze can", he immediately locked it up. He then arranged to hire Mr. Bochove as the General Manager for the new restaurant which he had constructed. He stated that Mr. Bochove had good references from the restaurant and dining lounge industry and that he made a good partner. He stated that he had made many improvements to the building and had a total investment of approximately \$750,000.00. He stated that basic soundproofing had been done but was not yet finalized, but he was prepared to provide further soundproofing if a Dining Lounge Licence is issued. He also confirmed that fire alarms would be installed to prevent the problems with respect to the rear fire door. He stated that he would have to remain open until 4:00 a.m. because of economics but would close at 2:00 a.m. if required.

In argument, counsel for the Board stated that the granting of a licence in these circumstances was not in the public interest having regard to the needs and wishes of the public and that no licence should be granted. He argued that if there was an application with respect to unlicensed premises with a prior poor track record, this created a greater onus on the Board to refuse the application for a licence and that greater weight must be given to the objections of people in the immediate area. He stated that the premises had been open for only a two-month period but during that time, there was continuous opposition which indicated that the residents of the area did not want licensed premises at this location. He stated that the needs and wishes of the people in support of the application can be supplied by other licensed establishments, and that 95 per cent of the residents within a 100 meter radius of the Applicant's premises are opposed to the issuance of the said licence. Counsel referred to the problems which would be caused by the dance floor, the evidence of open doors, kitchen noise and the problems of people leaving the premises at a late hour and he referred to the evidence of two witnesses who were located only a few feet away from the rear of the licensed premises. He stated that the opponents have satisfied the onus as required under Section 6(1)(g) of the Liquor Licence Act in that the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located.

Mr. Doucet, one of the parties to the proceedings, reiterated that the matter was a community concern of the many residents who had objected and who reside within 100 meters of

the Applicant's premises. He stated that their main concern is the noise coming from the music, from people leaving the premises, from traffic and from undesirable clientele who are stopped at the door. He stated that it is not the function of the Liquor Licence Board to issue licences in order to satisfy the financial requirements of the Applicant but rather in order to fulfill the needs of the community and that in these circumstances, the Dining Lounge Licence should not be issued since the great majority of residents in the immediate area are opposed. Mr. Doucet stated that the residents did not want channels for complaint, rather, they wanted no reason for complaint.

Counsel for the Applicant argued that the opponents to the application for the licence are the most directly affected but they are not the only persons involved. He stated that the municipality is much broader in nature and that the Tribunal must take into account the interest of all persons within the community, both residential and commercial. He argued that the case is not won or lost on either petition and that the Applicant's petition should be given weight. He stated that the area was already a mixed residential/commercial zone and that there must be a balance of the interest of the residents knowing of the commercial area with proposed commercial ventures in the area. He stated that the Applicant had shown good faith and was prepared to agree to reasonable terms within economic limits. He stated that the noise factor was the most important concern and that the parking or prostitution problems were of no real importance. He stated that the need for a doorman demonstrates a good business sense and that Mr. Hilton and Mr. Bochove are the type of people who are willing to obey the law as it is in their best interests to fulfill the concerns of the community. He stated that the purpose of the bar was to create a club atmosphere for the gay community which needed these particular facilities. Counsel argued that it could be better to have premises with a liquor licence as opposed to premises which were not subject to regulation under the Liquor Licence Act.

An application for a liquor licence in a mixed residential/commercial area often creates the problem of weighing the rights of the Applicant to receive his licence while, at the same time, weighing the nature and extent of the objections by the residents living within the area; such is the case in this hearing. However, after reviewing all of the evidence in this matter, the Tribunal finds that the Applicant is not entitled to a Dining Lounge Licence for the said premises because, in the view of the Tribunal, the issuance of



the licence is not in the public interest having regard to the needs and wishes of the public in the community in which the premises is located as provided in Section 6(1)(g) of the Liquor Licence Act. Petitions have been filed by both the Applicant and the objectors, but the Tribunal is of the opinion that greater weight should be given to the petition of the objectors in that the majority of the people signing the petition in opposition to the application for the licence are residents within a radius of 100 meters of the premises and the Tribunal is of the opinion that the right of these residents to the quiet enjoyment of their neighbourhood would be adversely affected. The concerns of these residents should not be overshadowed by the concerns for the patrons. The physical layout of the building makes it difficult to operate three floors as a dining lounge with only a kitchen on the main floor and there is every indication that the intention is to operate the said premises during the period from 10:00 p.m. to 4:00 a.m. seven days a week as a disco and club, and the Tribunal finds that this type of operation would adversely affect the rights of the residents in the area. The Tribunal accepts the evidence that there are presently serious noise problems and that they have not been alleviated to any extent since the time of the hearing before the Liquor Licence Board and, in fact, have been of greater concern during the summer months. Previous Decisions of this Tribunal have always given greater weight to the concerns and problems of the immediate neighbourhood as opposed to the rights of individuals in the broader community as a whole and the same principle applies in this hearing. This establishment has been operating without a licence for a short period of time, but problems have occurred almost immediately with the adjoining residential neighbours.

Accordingly, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, R.S.O. 1980, Chapter 244, the Tribunal confirms the Decision of the Liquor Licence Board dated the 5th day of December, 1985, whereby it refused to issue a Dining Lounge Licence to the Applicant for the premises at 553 Church Street, Toronto, Ontario.

566595 ONTARIO LIMITED  
(CHEATERS TAVERN)

APPEAL FROM A DECISION OF THE LIQUOR LICENCE BOARD  
TO ATTACH A TERM AND CONDITION TO THE DINING LOUNGE  
LICENCE

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
RONALD CHEMIJ, MEMBER

APPEARANCES:  
RONALD BIRKEN, representing the Applicant  
S.A. GRANNUM, representing the Liquor Licence Board

DATE OF  
HEARING: 16 January 1986  
Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by 566595 Ontario Limited, Licensee of premises called Cheaters Tavern from a decision of the Liquor Licence Board dated the 28th day of August, 1985, wherein that Board imposed a term and condition on the Licensee by ordering that "the sale of alcoholic beverages shall cease at 10:00 p.m. daily commencing September 9, 1985 and continuing until otherwise ordered by the Board".

The term and condition was imposed because the licenceholder, having a dining lounge licence only, had failed to meet the requirements of the Act and the Regulations in that the sale of liquor had exceeded 60 per cent of the total sales of liquor and food in the licensed premises.

The Regulation in this regard is quite specific. It is contained in section 9(6) of the Regulation to the Liquor Licence Act and it reads as follows:

In each premises for which a dining room or dining lounge licence is issued, the total receipts from the sale of food in any month shall not be less than 40 per cent of the total receipts from the sale of liquor and food in that month and a daily record showing the sales of liquor and food shall be maintained.



The Tribunal has reviewed the evidence presented to it on behalf of the Liquor Licence Board and by the Applicant to this hearing, and although we agree and accept that the Licensee has taken some positive steps to achieve a proper food/liquor ratio, the fact of the matter is, that he has not succeeded. Exhibit 8 which was extrapolated from the record submitted by the Licensee and the information obtained by the investigator for the Liquor Licence Board indicates that for the period January 1985 to July 1985, the food/liquor ratio was well below the required 40/60 level. It is to be expected that when the records for the balance of that year are filed, the 40 per cent ratio will not be met. Indeed it appears from the evidence of Mr. Mara, the actual sole owner of the company, that the 40 per cent ratio cannot be met under present operating conditions.

Having said that, the Tribunal cannot overlook the blatant contravention of the Act and the Regulation and it is therefore of the opinion that the imposition of a term and condition is appropriate. The Tribunal confirms the Decision of the Liquor Licence Board except to add that the term and condition shall remain in force until the appropriate food/liquor ratio is reached or until an entertainment lounge licence under the Liquor Licence Act is obtained, and directs the Board to set the commencement date of the said term and condition. \*

\*Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by 566595 Ontario Limited (Cheaters Tavern). The appeal had not been concluded at the time of this publication.

502377 ONTARIO LIMITED  
(CABARET RESTAURANT)

APPEAL FROM THE DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING  
F. THOMAS PEOTTO, MEMBER  
RONALD W. CHEMIJ, MEMBER

APPEARANCES:

THEODORE B. ROTENBERG, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 11, 12, 13 June, 1985

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by 502377 Ontario Limited from the Decision of the Liquor Licence Board of Ontario dated the 22nd day of January, 1985, whereby the Board revoked the dining lounge licence of 502377 Ontario Limited for the Cabaret Restaurant at 85 Bowes Road, Concord, Ontario, effective February 10, 1985.

The Applicant is the Licensee of the premises known as Cabaret Restaurant located at 85 Bowes Road, Units 1 and 2 (Concord) Vaughan, Ontario, and the said dining lounge licence was transferred to the Applicant in June of 1982. The Liquor Licence Board issued a Notice of Proposal on the 4th day of October, 1984, to revoke the said licence pursuant to Section 10(3) of the Liquor Licence Act because, according to the Proposal, the past conduct of the officers and directors of the corporation affords reasonable grounds for belief that its business has not and will not be carried on in accordance with law, honesty and integrity in that the Licensee by its officers and employees permitted drunkenness to take place on the licensed premises, it had filed with the Board false statements of the sales of food and liquor in the premises and because the licensed premises were not under experienced management and supervision so as to maintain an orderly operation. The Applicant requested a formal hearing before the Board pursuant to Section 11(3) of the Liquor

Licence Act and a hearing was held on the 25th day of October 1984. The Board, by its Decision dated the 22nd day of January, 1985, revoked the said dining lounge licence and the Licensee appealed their Decision to this Tribunal.

The first witness called on behalf of the Liquor Licence Board was Police Constable John Lucas of York Regional Police who gave evidence as to various incidents which occurred near the Cabaret Restaurant premises. He gave evidence as to the arrest and conviction for impaired driving of various persons who had driven from the Cabaret parking lot on various occasions and who admitted to the police officer that they had been drinking in the Cabaret. There was no evidence other than the admissions of the various accused as to where they had been drinking. Constable Lucas did give evidence of his attendance with other officers on the evening of March 22, 1984, where he was involved in the arrest of two persons, namely Richard Dukart and Bill Purtell who were charged under Section 45(4) of the Liquor Licence Act with being intoxicated in a public place and both of whom were convicted. The cross-examination of the witness confirmed that with respect to the various charges of impaired driving which were laid by him, he was depending on the admissions of the accused persons as to their source of alcohol and he had made no separate investigations.

The next witness called on behalf of the Board was Constable David Trach of the York Regional Police. Constable Trach gave evidence of various persons who were stopped while driving motor vehicles leaving the parking lot of the Cabaret Restaurant or in the vicinity of the restaurant who were charged and convicted of driving with greater than 80 milligrams of alcohol per 100 millilitres of blood contrary to Section 236 of the Criminal Code as it was at that time. Constable Trach was also involved in the arrest and conviction of two persons outside of the entrance of the Cabaret Restaurant, one of whom had a bottle of beer in his hand, who were charged and convicted of being intoxicated in a public place. On cross-examination, Constable Trach confirmed that he would not go into the Cabaret tavern after laying the charges against the various accused and he confirmed that the focus of his investigation would be on the behaviour and condition of the driver. He stated that it would have to be an extraordinary event to cause him to return to the Cabaret tavern.

The next witness called on behalf of the Board was Constable Paul Carlsen of the York Regional Police who was involved in an investigation at the Cabaret tavern on November 5, 1983. It appears that a patron of the tavern, Mario Cortuleuchi, had a verbal confrontation with Stephen Joseph Glazebrook, an employee of the tavern, and Cortuleuchi was assaulted by Glazebrook. It appears that he was struck and knocked to the floor and that some other unknown person kicked him. Constable Carlsen confirmed that the charge of assault laid against Glazebrook was withdrawn after a total of six adjournments. On cross-examination, the police officer confirmed his conversations with Cortuleuchi, who advised him that he could not identify the person who had kicked him and that it could have been another patron.

The next witness called was Constable William Davis of the York Regional Police who gave evidence with respect to an assault in the Cabaret Restaurant against a patron, Eric Morris, on the 2nd day of March, 1984. Mr. Morris was apparently assaulted by Francisco Darpino, an employee of the Cabaret, and as a result of the assault Morris suffered a broken jaw. The statement of Darpino given to the police officer was introduced as an exhibit in these proceedings. Darpino was convicted of two charges of assault relating to the said incident. On cross-examination, the police officer confirmed that he had not spoken to the management of the Cabaret Restaurant with respect to the incident and that the focus of his investigation was on the actual assault. He confirmed that the defence raised by the accused at his trial was that the injury was an accidental injury and that this had not been accepted by the trial judge.

The next witness called on behalf of the Board was Constable William Miller of the York Regional Police. He investigated an assault by Francisco Darpino, the above referred-to employee, who apparently assaulted and injured two patrons of the Cabaret, Peter Hawrylak and Leroy Manners, on April 13, 1984. Hawrylak suffered an abrasion to his cheek and a swollen eye. It appears that his friend, Manners, had spoken with one of the dancers who was performing at the time and, in turn, was spoken to by Darpino who escorted both of them from the premises. The police officer confirmed the evidence of Hawrylak who stated that when he turned to speak to Darpino, he was hit and knocked to the ground and kicked four to five times. Darpino's defence was that he thought that he might be hit by the patron and he, therefore, hit the patron first. It was confirmed that Darpino was the same person who was involved in the March 2 incident with Eric Morris. The police officer confirmed that Darpino was convicted of assault and fined \$300.00.

On cross-examination, Constable Miller confirmed that the trial had proceeded summarily and that the accused was not represented by defence counsel. The police officer confirmed that he spoke to Malcolm Conjiers who was the Night Manager in the Cabaret at the time and Conjiers confirmed that Darpino had removed the patrons because he did not want them standing up.

The next witness called on behalf of the Board was Constable Ronald Laing of the York Regional Police. Constable Laing testified with respect to an incident which occurred on July 13, 1984, when a patron of the Cabaret Restaurant, Howard Taylor, was allegedly assaulted by Paul Malagerio, an employee of the Cabaret, on the premises. Constable Laing testified that on August 9, 1984 he served a summons on Malagerio charging him with assault. He advised that the accused had appeared on a preliminary hearing and had elected a trial by judge and jury, but that to his knowledge no trial date had been set. The police officer referred to a statement given by the patron, Taylor, who stated that he was at the Cabaret with a friend, John Hicks, having a few beers. Taylor stated that he approached one of the exotic dancers and asked her to perform a table dance. Apparently, he was requested on several occasions not to stand and he stated that he was suddenly punched in the face without warning and knocked down. He stated that he was kicked several times and was dragged outside of the restaurant. Mr. Taylor stated that he was treated in the hospital for rib injuries resulting in his ribs being taped. He also suffered two severe cuts in the mouth. The police officer advised that he took a statement from John Hicks, a friend of Taylor who was with him at the time, who corroborated the evidence of Taylor.

On cross-examination, the police officer confirmed that he was reading from a Crown brief which had been prepared by him and he confirmed that this was anticipated evidence. He stated that Taylor was a man of about 55 years old who was approximately six feet tall and weighed 210 pounds. He stated that he had no knowledge of Taylor's behaviour when drinking. He confirmed that Hicks was smaller and older. He stated that there was indication that a second bouncer or doorman who was an employee of the Cabaret was involved in the incident but that Mr. Sit, the proprietor of the Cabaret, had instructed Malagerio not to provide any information to the police. He confirmed that the focus of his investigation was on the assault incident and not on the Cabaret Restaurant. He also confirmed that Malagerio was the Assistant Manager, and that he was about five feet ten inches tall and weighed approximately 180 pounds.



The next witness called on behalf of the Board was Detective Armand LaBarge of the York Regional Police. He was involved in the investigation of an assault which occurred on September 28, 1984 against Brian Downey, a patron of the Cabaret Restaurant. As a result of this investigation, three doormen, all employees of the Cabaret, were arrested and charged. They were Antonio Sotera, Casendra Sotera and Robert Marcos. Detective LaBarge testified that Mr. Downey had been drinking in the Cabaret and that one of the nude dancers had been performing a table dance for him. It appears that Downey attempted to kiss her buttock and was immediately apprehended by one of the bouncers who escorted him outside to the parking lot in front of the Cabaret. The police officer stated that the evidence was that all three accused men returned outside and that in the confrontation which followed Downey was knocked to the ground and was kicked by both Antonio Sotera and Casendra Sotera while Robert Marcos, the third bouncer, held the other patrons back. Detective LaBarge confirmed that Downey was then left on the ground and was subsequently taken to the hospital suffering from very severe head injuries. The evidence of Detective LaBarge was that Downey had been in a coma for several months and was still in a coma. Detective LaBarge confirmed that Paul Malagerio was in charge of the restaurant at the time of this incident and that he was the same employee who had been involved in the assault and injury to Howard Taylor. Apparently, Mr. Sit was not in the premises at the time. Detective LaBarge stated that Malagerio advised that he did not see any part of this incident because he was at the back of the restaurant premises ejecting a patron from that area. When he returned, he could not find any of his bouncers on the floor of the restaurant and when he located them outside, he ordered them back in. He stated that he had no knowledge of the Downey incident. Detective LaBarge stated that there had been a preliminary hearing held in Provincial Court in Newmarket and that all three accused had been committed for trial.

On cross-examination, Detective LaBarge confirmed that in his evidence he was referring to the Crown brief which had been prepared by him and Constable O'Grady and that they had jointly been involved in the preparation of the Crown brief. He stated that Constable O'Grady had listened to the evidence given at the preliminary hearing and that Detective LaBarge was not at the hearing and did not have a transcript of the evidence. He acknowledged that the Crown brief may be different from the evidence which is ultimately given at the trial of the three accused. The police officer stated that some of the witnesses had signed statements and he had had the



benefit of reading these statements. He stated that a witness named Lound confirmed that all three bouncers came out of the premises at the same time. He stated that Downey had asked him to go back into the Cabaret to get Downey's friends. Detective LaBarge also stated that he had interviewed Gary Merritt who claimed that he had been assaulted in the parking lot of the Cabaret, but that he did not know who hit him. Detective LaBarge confirmed that Malagerio had been questioned and that the questions and answers were taken down by Constable O'Grady. Detective LaBarge confirmed that two other police officers were in the Cabaret Restaurant when the Downey incident occurred and that they were Detective Peter Thompson and Constable David Ground. He stated that some witnesses came forward to confirm that they had witnessed the events on the evening of September 28 and that others had contacted the police at a later date. In addition, Detective Thompson had located some witnesses through a licence plate number. The officer stated that Downey was apparently escorted out of the premises by Tony Sotera and that Sotera had acted properly at this time, but that it appears that the assault occurred after Downey had been ejected although the period of time which passed had not been noted.

The next witness called on behalf of the Board was Constable Terry Creighton of the York Regional Police. His first testimony concerned an incident on March 6, 1984, when he was in the Cabaret parking lot and he discovered one, Douglas Bert, asleep in his car in the parking lot. Bert was given a breathalyzer test and he blew 220, substantially in excess of the legal limit of 80 milligrams of alcohol per 100 millilitres of blood. Constable Creighton stated that Bert was quite intoxicated and that he admitted that he had been drinking in the Cabaret Restaurant. He was convicted and sentenced to 21 days in jail.

Constable Creighton gave evidence of a further incident on March 24, 1984, when he observed a motor vehicle driven by one, Paul Kay, leaving the Cabaret Restaurant parking lot quickly. He was given a breathalyzer test and as a result was charged and convicted under Section 236 of the Criminal Code. He had readings of 130 and 120 parts of alcohol, respectively. He was sentenced to 21 days in jail.

Constable Creighton gave evidence of a further incident which occurred on April 25, 1984, when he observed a car leaving the parking lot of the Cabaret. The driver was stopped and ultimately given a breathalyzer test which resulted in two readings of 210 parts of alcohol. He was convicted under Section 236 of the Criminal Code and fined \$200.00.

On May 5, 1984, Constable Creighton observed a motor vehicle leaving the Cabaret parking lot driven by James Irwin who was charged and convicted of impaired driving and fined \$300.00.

On May 10, 1984, Constable Creighton observed a motor vehicle leaving the Cabaret parking lot which vehicle was driven by Daniel Giffen. Giffen acknowledged that he had been drinking in the Cabaret and a breathalyzer test confirmed readings of 120 parts of alcohol. He was convicted under Section 236 of the Criminal Code and sentenced to 14 days in jail.

On May 12, 1984, Constable Creighton observed a motor vehicle leaving the Cabaret parking lot driven by Douglas Reynolds who confirmed that he had been drinking in the Cabaret. A breathalyzer test confirmed readings of 130 parts of alcohol, but Constable Creighton advised that this charge was dismissed.

Constable Creighton gave evidence with respect to an incident on May 30, 1984 when he was in the Cabaret parking lot and saw a car leave the lot and stop on the road. The motor vehicle was driven by Craig Meyers who was behaving in a very loud manner. When requested to take a breathalyzer test, he refused. Constable Creighton stated that the accused was convicted of refusing to take a breathalyzer test and was fined \$650.00.

Constable Creighton gave evidence of eight other incidents involving persons either driving motor vehicles or in the care and control of motor vehicles who were apprehended either in the Cabaret parking lot or as they left the parking lot. These incidents occurred during the period from May 30, 1984 to September 22, 1984 and, according to Constable Creighton's testimony, six of the accused were convicted of alcohol related driving offences. One was released on a 12 hour suspension and the eighth case is still before the Courts.

On cross-examination, Constable Creighton confirmed that he was taking his information from the arrest reports and that the records of conviction with respect to all of the charges referred to by him in his testimony were recorded by the Crown. He stated that he was not in Court and that the information was taken off of the dope sheet. He was questioned with respect to the incident of May 5 relating to Gordon Lewis and he stated that he remembered these facts very well due to the condition of Lewis and the problems that he had getting him

out of the car. He stated that he usually asked an accused driver where he had been drinking, but that the answer of the accused as to how much he had to drink was not reliable. Constable Creighton stated that one of the accused confirmed that he had been drinking in more than one place. He stated that when he was on patrol, he would sweep the parking lots of various licensed premises to check for impaired drivers before they got on the road. He confirmed that his notes with respect to the various persons charged and convicted did not indicate where the accused had been drinking. He also confirmed that unless there had been a reference in his report, he would assume that there had been no erratic driving on the part of the accused.

The next witness called by counsel for the Board was Adele Downey, the mother of Brian Downey. Counsel for the Applicant objected to her as a witness on the grounds that she could only express opinion evidence. The Tribunal agreed to her being called as a witness on the basis of her evidence being limited to medical evidence with respect to the injuries suffered by her son. She testified that he had been sent by ambulance to York Finch Hospital and when he lost consciousness, he was transferred to Humber Memorial Hospital where he remained in intensive care for three weeks. He was then transferred back to York Finch Hospital and remained in the hospital until February 25, 1985. He was in a coma for a period of approximately three months. The witness stated that Downey now suffers from post-traumatic amnesia and is conscious but has lapses of memory and suffers from some paralysis on the right side. He is again learning to walk and is taking speech therapy and is presently in West Park Lodge.

It was agreed by counsel that the transcripts of evidence of Police Constable Michael Flemming from the trial of Mr. Sit and 502377 Ontario Limited in the Provincial Court where they were charged with a breach of the Liquor Licence Act would be admissible in these proceedings. Constable Flemming gave evidence of the events of March 22, 1984, when he attended at the Cabaret Restaurant. The witness testified that he was dressed in blue jeans, T-shirt and was not in uniform. He stated that he was sitting at a table facing the entrance and adjacent to a long table where there were approximately six persons seated. He confirmed that Mr. Sit was in the premises at the time and was either behind the bar taking money from the waitresses or was assisting in the serving of liquor. He also moved about the restaurant during the course of the evening conversing with floor men and waitresses and other persons in the tavern. The witness gave specific evidence as to the

conduct of Bruno Kanasawi, Patrick McNeil, David C. Potter, Darren T. Kozeyah and Randolph Rivers, all of whom were seated at the adjoining table. The police officer gave evidence as to their state of intoxication and in his opinion all of the said parties were intoxicated and that subsequent to his observations of intoxication, they continued to be served by the staff members of the Cabaret. The witness confirmed that Kanasawi, Potter, Rivers and McNeil were all charged with being intoxicated in a public place contrary to Section 45(4) of the Liquor Licence Act and included in the evidence filed with the Tribunal were the certificates of offence with the convictions entered in each case. The transcripts of the evidence of the witness go at length to his cross-examination as to the state of intoxication and the conditions of the various parties. There were six additional certificates of offence filed as exhibits charging six other persons with the same offence on the same date and specifying the offence to have occurred in the Cabaret tavern and a total of ten persons were convicted for the same offence on that date.

The first witness called on behalf of the Applicant was Nalin Nathwani who had been employed as the General Manager of the Cabaret Restaurant until May 31, 1985. He stated that included in his duties was the responsibility to keep records of the day-to-day operations of the Cabaret and he reported to the owners who were always there daily. He was also responsible for the liquor filings and he confirmed in his evidence that the reports filed with the Liquor Licence Board for the months from and including March of 1984 to July of 1984 re the food/liquor ratio were false. He stated that the total sales were correct, but that the ratio had been falsified on instructions from the owners. He stated that as a result of a G-string by-law in Brampton and the closing of Studio 134 in Markham, there was a substantial increase in business and this adversely affected the ratios. The witness stated that he started with the Cabaret in August of 1983. The witness identified Exhibits, numbers 12 and 13, which were filed showing the calculations of actual food/liquor sales for the period from October 19, 1984 to May 25, 1985, together with a graph of sales for the period from November of 1983 to November of 1984. He stated that after the Liquor Licence Board had discovered the false records, an application was immediately made by the owners for an entertainment licence. The witness then discussed various promotions which were offered by the Cabaret including a free table dance if food was ordered, a cover charge of \$2.00 redeemable against food and a promotion to provide free french fries if beer was ordered. He also gave evidence as to the buffet provided by the restaurant at noon and for the period from late afternoon until closing.



The witness gave evidence as to his responsibility for the hiring of staff including doormen and floor managers. He stated that an application form must be filled out and that he would be responsible to check the references of the Applicants. He stated that he set the rules for the employees and that these rules were posted on a board. He advised that the doormen and floor persons were told to be polite but firm. He stated that when he was on duty, he would be on the floor at least 60 per cent of the time. He stated that references would be checked out by telephone and that staff meetings were held once a month, at which time any problems were discussed. He also discussed problems in his office with respect to individual employees. In selecting a doorman, he would look for experience together with recommendations from other members of the staff. He stated that doormen were instructed to escort any patrons who were not behaving properly from the premises and that they were told only to use force as a last resort. He stated that he only knew of one person who appeared to use excessive force and that he was employed for only one week.

On cross-examination, the witness stated that the fact that the food/liquor ratio was shown as exactly 60/40 for several months was merely coincidental. He also confirmed that the main food sales were at lunch time and from approximately 6:30 p.m. to 8:00 p.m., but that little food was sold after that time. He stated that he probably had checked the references of Darpino and Malagerio, but he could not specifically recall that. He stated that he did not recall the incident of March 2, 1984 when Darpino was charged with assault, although he confirmed that Darpino had been suspended for one week. The witness also stated that he did not ask questions with respect to any problems in the parking lot at staff meetings. He stated that there were no rules regarding the treatment of patrons but reiterated that force would be used in the discretion of the doormen and the floor managers, but only if necessary.

The next witness called was John Sit, one of the proprietors of the Cabaret Restaurant and an officer and shareholder of 502377 Ontario Limited. He stated that he came to Canada in 1972 and had previously been a manager of a restaurant in Hong Kong. He obtained a Degree of Bachelor of Commerce from the University of Toronto and purchased the Cabaret in 1982. He stated that he had worked for the previous owner for a period of six months before acquiring the business. He testified that the staff were given specific instructions with respect to the over-consumption of alcohol by patrons and that the waitresses must not serve such patrons.

They were instructed to look out for the type of behaviour including such signs as their method of conversation and the manner in which they were conducting themselves. The witness stated that he was usually present from 4:30 in the afternoon until closing time at 1:00 a.m. every night. The employment of the doormen was usually checked by the Floor Manager and the General Manager, and their manner and experience and the way in which they presented themselves to customers, as well as the fact that they must be in good physical shape, were all points that were taken into account in employing doormen. He stated that all were instructed to talk first and only use physical force as a last resort. He also stated that the doormen and other employees were warned not to go outside the actual premises of the restaurant. He referred to the plan of the premises which indicated that there are no windows looking on the parking lot. He stated that there was always a congestion problem around the front door at night. Mr. Sit stated that if a waitress or doorman had a particular problem, he would have a person-to-person meeting with them and that special meetings of the staff would be held if there were serious incidents. He stated that there had been some meetings with respect to the problem of the over-serving of patrons.

The witness advised that he was present in the restaurant at the time of the Glazebrook incident and was in the kitchen at the time. He stated that he was only aware of the Darpino incident of March 2 when he saw Mr. Darpino in the cruiser and he asked why he was being taken away. He confirmed that he arranged for and paid for Mr. Darpino's defence to the charges arising out of the March 2 incident. He stated that it was the policy of management that if an employee was on duty and inside the premises, management would pay for their defence with respect to any charges laid against them. He stated that with respect to the second Darpino incident of April 13, he had no knowledge of the incident as it had not been reported to him and he did not pay for Darpino's defence.

With respect to the Malagerio incident of July 13, 1984, the witness stated that he was on the premises at the time but did not see the actual incident. Malagerio told him that Taylor was standing in the hallway area and refused to move. When Malagerio took action to physically set him down, Taylor got aggressive and Malagerio proceeded to pull a T-shirt over his head.

The witness stated that he had had a lot of trouble with the York Regional Police and that he felt they did not like his presentation of entertainment. He stated that between



150 and 170 charges had been laid against the dancers with respect to their performances, but that there had been no convictions. He stated that there had been no complaints before the incident of March 10, 1984 when between 30 and 40 police officers came to the premises. The witness stated that he had had no complaints with respect to excessive force against the patrons. He stated that he was present when Malagerio was served with a summons by the police and that he did advise him not to say anything.

The witness testified that he was on duty in the Cabaret at the time of the Downey incident, but that he was in the coffee shop and that Paul Malagerio was in charge as Floor Manager which included the responsibility for the entertainment, the dancers and the waitresses. He had no firsthand knowledge other than that he had been advised by Malagerio when he returned to the restaurant that a drunk had been picked up by an ambulance, and he only learned of the seriousness of the injuries on the following Saturday afternoon. He stated that at the time of the incident, Marcos was supposed to be on the door. He confirmed that he was paying the cost of Marcos' defence but not for the Soterias. He stated that Marcos had actually tried to stop the fight. The witness stated that he would not pay for the Soterias' defence because they had broken the rules by fighting outside. The witness also stated that there had been no previous indication that the Soterias would use excessive force and that in his opinion, neither Darpino nor Glazebrook were guilty of using excessive force. He had no comment with respect to Malagerio.

On cross-examination, the witness confirmed that his knowledge of the Downey incident was to the effect that two police officers had found a drunk in the parking lot and had called an ambulance. He acknowledged that he was familiar with the regulations of the Liquor Licence Act and that the Cabaret was classed as a restaurant and was responsible for the sale and service of meals to the public. He reiterated that the door charge of \$2.00 was not a cover charge but that it was a food charge and that there was a large sign to that effect. He confirmed that the coupon for the food charge could be redeemed on the evening of purchase or at any other date, or that the coupon could be given to another person. When asked about the use of physical force, he stated that it was necessary to remove a patron in certain circumstances and that sufficient force to do so would be used. The witness stated in answer to a question with respect to the discussion at staff meetings of violence that the matter had never been discussed at any meeting. He stated that the entertainment dancers

performed on the stage unless they were performing a table dance at the request of the customers, at which time they would be a distance of approximately one to two feet from the customers. They were prohibited from making any physical contact. He stated that the removal of the G-string is in the discretion of the dancer. The witness acknowledged on cross-examination, that between November of 1983 and July of 1984, there were at least five incidents involving assaults on or injuries to patrons. He also confirmed that the Soterias, Marcos and Darpino all left the employment of the Cabaret shortly after the date of the Downey incident.

The next witness called for the Applicant was Azad Rajan who is a co-owner of the Cabaret Restaurant and he confirmed that he entered into partnership with Mr. Sit in 1982. He stated that he had no disagreement with the evidence of Mr. Sit. He confirmed that the employment procedure for doormen was to check out their references but that usually he depended on watching their behaviour for a couple of weeks. He stated that Paul Malagerio was involved as a partner in a karate and judo club. The witness was very emphatic that the Cabaret had not employed doormen who had a propensity for the use of violence. He stated that since the Downey incident, they had used an independent agency to check out any applicants for the position of doormen or bouncers. When questioned about the food/liquor ratio, the witness stated that if the Cabaret was unable to employ the food charge program and the combined french fry sales with beer, they would be unable to meet their ratio because they had too much liquor business and he stated that the proper solution was for the Cabaret to obtain an entertainment lounge licence. The witness stated that he was responsible for the restaurant for the shift from 10:00 a.m. to 6:00 p.m. each day and that this was his full-time occupation. He stated that there had been no complaint to him by either the police or any patrons of the use of excess force and that there had been no complaints prior to March 10 re the number of impaired drivers. He stated that police officers, usually in plain clothes, were in the bar or more daily. He stated that he had held staff meetings from time to time, at which time there had been some discussion with respect to the ejection of patrons. He stated that the effect of the March 22 incident made all of them aware of the seriousness of the charges. He stated that none of these problems arose in the daytime and that it was not necessary to have doormen on duty during the day.

On cross-examination, the witness confirmed that the Cabaret Restaurant would not meet the food/liquor ratio requirements of the Liquor Licence Act if there were no promotions. He stated that management had no intention to change the type of operation because it was a successful operation at this time. It had between 32 and 35 employees, including both full-time and part-time employees and this included four full-time doormen and three part-time doormen. He stated that there were no incidents arising between the patrons and the dancers during his daytime shift.

The next witness called on behalf of the Applicant was Detective Sergeant Peter Thompson of the York Regional Police Department. He stated that he was in the premises on the evening of September 28, 1984 with Police Constable Grimes and that he was in plain clothes making a routine check of the premises. He stated that he was standing by the bar when he observed an incident in the area to the right of the bar where an exotic dancer was performing a table dance with her back to a patron. She suddenly straightened up and slapped the patron on the face. The dancer picked up the table and pushed it towards the patron but did not hit the patron. She appeared upset and walked away. The witness stated that Tony Sotera went over and spoke to the patron and escorted him out of the premises side by side. Sergeant Thompson identified the patron as Brian Downey and he confirmed that no physical force was used up to that point. Downey passed within one foot of him and he stated that Downey was not intoxicated, but that he had a silly grin on his face as if he were amused. The witness stated that he saw no sign of warning which would raise an alarm in his mind and saw nothing unusual in the premises. The witness stated that he and the other officer started to leave when a patron made a comment about an incident which had occurred outside. He stated that two of the doormen were standing outside by the door and that they were Casendra Sotera and Mr. Marcos. Tony Sotera was about 45 yards down in the parking lot arguing with a number of people getting into a car. He stated that Tony Sotera made a comment, apparently for his benefit, "come on you fellows - no more fighting". The witness felt that this was a staged comment. As the people got into the car, one of the passengers shouted back an obscenity and the police officer took down the licence plate number and referred it to Detective LaBarge the next day as he was in charge of the Downey investigation. The witness stated that he noticed a person lying on the ground about ten feet west of the door to the Cabaret and that he was subsequently identified as Brian Downey, but Detective Sergeant Thompson did not identify him at that time as the person in the tavern. He appeared to be

unconscious apparently from liquor and he could not be awakened. The police officer moved him over to a grassed area and asked Paul Malagerio, the Manager who was outside, to call for an ambulance. He stated that there were no signs of a serious assault and when he asked Tony Sotera what had happened, Sotera replied that the people in the car had been involved with the person lying on the ground. However, two witnesses then approached and stated that the doorman had struck Downey and this was confirmed by another witness. Detective Sergeant Thompson was involved in the arrest of Masendra Sotera the next day and he was advised by Mr. Sit in conversation with him that Mr. Sit offered to obtain a lawyer for Sotera. On cross-examination, the witness stated that he did not see Sotera return to the tavern after escorting Downey out and that he was physically a large person. He stated that he had seen people being ejected from the tavern from time to time.

The next witness called on behalf of the Applicant was Paul Malagerio who had been previously employed by the Floor Manager at the Cabaret. He stated that he had been dismissed from his position on the day after the last hearing before the Liquor Licence Board and he acknowledged that he was upset about the firing and had been subpoenaed to testify before the Tribunal. He confirmed that he was a karate expert for fifteen years and had the status of a "black belt". He stated that he taught common sense self-defense. The witness testified with respect to the Taylor incident and stated that Taylor had been asked several times to be seated and that he appeared to be intoxicated and was interfering with a dancer as she performed a table dance. The witness stated that Taylor resented being asked to sit down and kept wandering around and finally took a swing at Malagerio who pushed him into a chair. Malagerio took Taylor outside and stated that it was not necessary to use force at that time. The witness stated that the atmosphere within the Cabaret was very frustrating to many male customers and that at least four fights had broken out on the evening of the Taylor incident. He stated that he would grab the patrons and put them outside and would remove them by physical force. The witness stated that it was necessary to use force at the Cabaret more often than most places where he had been employed in the past. He stated that it was very frequently necessary to use force to escort people out. He always instructed the doormen that the use of force would be a last resort and acknowledged the rules of conduct issued by the Cabaret to all new doormen. He stated that a potential doorman must be able to handle his job and that he had been involved in several staff meetings to



discuss the procedure to be followed by doormen. The witness stated that he had been the Floor Manager on the night of the Downey incident but that he did not see the ejection of Downey. He stated that he was involved in ejecting a patron from the rear door who had been jumping on the stage. He stated that he was doing his usual rounds and saw that the doormen were missing and went looking for them. He went outside after Detective Sergeant Thompson and saw Downey on the ground and phoned for an ambulance.

On cross-examination, the witness stated that he had been employed with the Cabaret from May of 1984 until November of 1984. He stated that often the Cabaret was very crowded and that frequently dancers would be touched by the customers and that the owners were aware that this was going on. He stated that Mr. Taylor appeared to be intoxicated and that patrons frequently would become intoxicated especially in the later hours. He stated that if a customer was intoxicated but was not known, he would not be served any further liquor. During the period of his employment, the witness stated that Mr. Sit was only present at one meeting and that he had only been involved in two meetings, one in August and one after the Downey incident. The witness testified that Malcolm Conjiers, who had been the Floor Manager until August of 1984, told him to make a point if someone touched a dancer. He stated that many times, if a person touched a dancer, he would be followed out into the parking lot and would be struck. The witness reiterated that the owners were aware of the dancers being touched by the patrons on a regular basis.

The next witness called on behalf of the Applicant was Michael Buffy who was the proprietor of a small restaurant in Scarborough. He stated that he had worked for the Cabaret as Floor Manager from June of 1983 to February of 1985 mainly on the evening shift and that he was responsible for the supervision of the floor staff and doormen including their hiring and firing. He stated that he would look for a clean-cut individual with the ability to talk and in good physical shape. He stated that his specific instructions were that physical force would only be used as a last resort and that if a doorman used excessive force, he would be fired. He stated that, if a doorman was involved in the use of force, there would be a discussion after the event and he would be put on a two-week probation period. He stated that force was not used on a regular basis and probably no more than once a month. He stated that most people who were asked to leave left on a voluntary basis. The reasons for being asked to leave were mainly because of intoxication, language or the

touching of dancers. He stated that pushing and shoving would happen quite often, especially in a large bar, but that at the Cabaret, he would not have to use force every night. He stated that if a patron is cut off by a waitress, she advises the doorman, the person is permitted to finish his drink and then asked to leave. He stated that he was on duty on the evening of March 22 when the police made their major investigation and that the staff had been serving the patrons properly that night. He stated that none of the patrons alleged to be drunk were shown to him. The witness denied any knowledge of Malcolm Conjiers' testimony re patrons who had touched dancers being followed into the parking lot.

On cross-examination, the witness stated that his job was not to supervise the parking lot but only the Cabaret and that he did not check on the doormen going outside. He stated that if there was a busy night and he had to escort a lot of people out, then there would be a discussion with the staff but this discussion would usually be only with the doormen. He stated that the main problem was excessive consumption and the second problem was the live entertainment. The witness stated that if a fight broke out, the doormen were instructed "no head shots - just body shots".

The next witness called on behalf of the Applicant was Malcolm Conjiers who had been the Floor Manager of the Cabaret and had been employed from March of 1984 until August of 1984. He stated that he left on good terms and for personal reasons. He stated that the policy of the Cabaret was that intoxicated patrons must be refused service. If they were not rowdy, they could finish their drink. He stated that if a patron touched a dancer, he would immediately be escorted out and that the owners did not turn a blind eye. He stated that the use of force was prohibited until it reached the point of self-defence. He testified that he never saw any incidents of excessive force and that on the odd occasion, force would be used only for self-defence. He stated that fights were very uncommon and that there were never any brawls. The witness stated that there were never three or four forcible ejections in one evening and not even three or four fights in a month. He stated that his instructions to the doormen were that he preferred them not to be in the parking lot, but that they might have to escort a dancer to her car. The witness denied that he had ever been involved in any assault on a patron. On cross-examination, the witness stated that he had been on the day shift for the last two months. He stated that occasionally a patron would try to touch a dancer and that there would be an occasional bad night but no scuffles.



The next witness called on behalf of the Applicant was Susan Crosby who was a waitress at the Cabaret and had been on duty on the evening of March 22, 1984. It was agreed by counsel that her evidence with respect to the events of March 22, 1984 would be by the transcript of the evidence from the criminal charges and copies of the transcript were to be provided to the Tribunal. She gave evidence generally as to the policy with respect to an intoxicated patron and that the doormen would escort patrons out when they would not leave on their own. The witness stated that, in her opinion, the presence of table dancers does not excite the patrons and that there was no problem with the level of violence in the Cabaret. She stated that she was aware of only three incidents of a scuffle between a patron and a doorman since the start of her employment in November of 1983, and she advised that she had no knowledge of the Glazebrook or Darpino incidents, or any of the other incidents. The witness stated that there was a staff meeting approximately every two months, at which time they would discuss general problems such as uniforms, the failure to eject patrons and other staff problems. The witness stated that on the evening of March 22, she did not serve any intoxicated persons, but that that episode had made her more aware and that she had been watching the patrons far more closely since that time. The witness stated that she had worked the evening shift in March and April of 1984, but had no recollection of any of the incidents referred to in the testimony of the various witnesses before the Tribunal.

Mr. Rajan was recalled on behalf of the Applicant and he stated that there had been no criminal charges since the Downey incident and no other charges of any kind. However, on cross-examination, he stated that he was aware of a charge against Michael Buffy for assault in November of 1984 and that Rick Taylor, the disc jockey, had been charged with assault in the same incident. He stated that Paul Malagerio had been discharged the day after he had testified before the Liquor Licence Board.

The only additional evidence presented before the Tribunal were the transcripts of the evidence given by Susan Crosby and Maria Gosetto as witnesses for the defence, which transcripts of evidence, after some considerable delay, were delivered to the Tribunal. The witnesses were waitresses in the Cabaret Restaurant on the evening of March 22, 1984 and they gave evidence in Provincial Court as to the events of that evening. A summary of their evidence was to the effect that up to the time of the appearance of the police officers,

there were no unusual events such as fighting or people creating disturbances and that, in their opinion, none of the customers whom they served were creating any problems of any kind.

In argument, counsel for the Board referred to Exhibit 10 which had been filed before the Tribunal which confirmed the filing of false statements with respect to the food/liquor ratio for the period from March of 1984 to July of 1984, inclusive. He referred to the evidence that the instructions re the filing of the false statements came from the owners to the General Manager of the restaurant and was the first indication that the Applicant had not carried on its business in accordance with integrity and honesty. The Tribunal was referred to the case of Re: Don Howson Chev-olds Limited (1974) 6 O.R. (2d) 39. This case, which was dealing with the Motor Vehicle Dealers Act, stated that the manner in which officers and directors of a corporation handle their employees is most relevant to Section 5(1)(c) of the Act. Counsel alleged that these actions in themselves were sufficient to justify revocation of the liquor licence.

Counsel for the Board proceeded to deal with the evidence relating to the excessive use of force by employees of the Cabaret against the patrons and he referred to the various incidents where patrons were injured or alleged to have been injured as a result of confrontations with the doormen and bouncers. He referred specifically to the Downey incident, the Malagerio incident and the two Darpino incidents, and pointed out that the second Darpino incident occurred approximately one and one-half months after the first incident, but Darpino was still employed by the Cabaret. Counsel alleged that there was no justification for the amount of force used as all of these patrons had suffered serious injuries. He referred to the fact that the owners were paying the legal fees with respect to the defences of the employees and should be fully aware of the implementation of the force policy. Reference was made to the evidence of the three doormen who were called and gave evidence that force was used only if necessary, but referred to the specific evidence of the one witness who stated that his instructions were to use body blows only with no "head shots". Counsel argued that the officers and directors of the corporation must have known that continuation of this policy of force would ultimately result in severe injury. He referred to the opinion given by the witness Conjiers that one of the convictions was wrong which indicated no attempt on the part of management to restrain or change their policy of force.

Counsel for the Board referred to the evidence of the incident of March 22 and the conviction of the various patrons, together with the many impaired charges which were laid against persons leaving the Cabaret. He also referred to the adult entertainment and, in particular, the table dancers as being an important part of the operation and the fact that management did not want any change. He argued that the environment created by the nude dancers combined with the liquor licence created a greater onus and responsibility on the part of management to protect those patrons who may have lost their inhibitions. He argued that it appeared that it was more important to management to protect their dancers than it was to protect the welfare of the patrons of the restaurant.

Counsel referred to the decision of the Tribunal in Re: Tramps Restaurant (1984), vol. 13, page 17 in the Tribunal's Decisions and commented upon the similarity of the two appeals. The combination of violence and intoxication created an onus on the Licensee to be extra careful because of the circumstances. He submitted that there was a need to show a deterrent and give a message to other Licensees and that the evidence before the Tribunal was sufficient to justify the revocation of the liquor licence.

Counsel for the Licensee acknowledged that the Downey incident was the most serious of all the grounds alleged but that the specific actions of the employees outside of the premises does not justify the loss of the licence. He stated that the evidence before the Tribunal indicated a vendetta on the part of three people, i.e., the three doormen, initiated on their own and there was nothing to indicate the reason for the attack. He submitted that this was not an indication of a lack of proper management. He argued that the owners were businessmen who were attempting to operate their business in a proper manner and that there was nothing to indicate that the managers and doormen would not properly enforce the rules. He stated that a distaste for the entertainment policy of the Cabaret does not detract from the right to carry on a legitimate business and he disagreed that there was a need for a higher onus because of naked dancers. He stated that the same standard is applicable to all Licensees. He acknowledged that it might be harder to achieve that standard but that the standard, itself, is not higher. Counsel argued that the Licensee is not a guarantor and that the use of excessive force is not a reason for revocation. He alleged that the evidence of five or six incidents by themselves do not lead to a conclusion that there was a lack of supervision. He argued that the burden of proof is on the Board to show a lack of

supervision and that the Board had not satisfied that burden. Counsel alleged that the facts were entirely different in the decision of Re: Tramps in that management in that case had not met the terms and conditions, had continued to show persistent violations and that the police had made efforts to bring the abnormal incidents to the attention of management. He argued that the penalty of revocation was very rare and that there were only two such revocations to his knowledge. He stated that there must be repeat violations of serious matters in order to justify revocation. Counsel referred to the decision of the Tribunal in the appeal of Tweedsmuir Hotel (Westport Limited), Volume 11, page 68, and on the basis of that decision, argued that the evidence of the conviction of various patrons for impaired driving outside the Cabaret could not be construed as evidence that the Licensee was permitting drunkenness on the premises.

Counsel for the Licensee also argued that the Applicant was being subjected to double jeopardy under the Charter of Rights in that it had been acquitted in Provincial Court of a charge of permitting drunkenness contrary to Ontario Regulation 581 Section 8(4) of the Liquor Licence Act, which charge specifically referred to the incidents of March 22, 1984. Counsel referred to two cases, the first being Regina v. B & W Agricultural Services Limited, et. al., 3 C.C.R., 54, where the defendant was charged with the offence of having no licence under The Aeronautics Act where there had been a previous hearing before the Air Transport Committee and the Judge in the Provincial Court proceedings stayed the prosecution on the grounds of double jeopardy. The second case referred to was Regina v. Wigglesworth, 9 C.C.R., 47, where a police officer was charged with common assault after having been found guilty and fined before a police tribunal. The Saskatchewan Court of Appeal held that there was no double jeopardy and that a single act may give rise to more than one legal consequence. Counsel for the Applicant argued that in the Regina v. Wigglesworth case the charges were different charges laid under two different sections, one charge having been laid under The Royal Canadian Mounted Police Act and the second charge having been laid under the Criminal Code. Counsel argued that in this appeal the same section of the Regulations of the Liquor Licence Act and incident is used in the same proceedings and that the decision in the B & W Agricultural Services Limited case should apply.

There are three allegations made in the Notice of Proposal of the Liquor Licence Board issued on the 4th day of October, 1984 which are as follows:



1. Contrary to Section 8(4) of Regulation No. 581/80, the Licence holder, by its officers and employees, permitted drunkenness to take place in the licensed premises.
2. Contrary to Section 8(15) of the said Regulation, the Licensee has filed with the Board false statements of the sales of food and liquor in the premises.
3. Contrary to Section 8(15) of the said Regulation, the licensed premises is not under experienced management and supervision so as to maintain an orderly operation.

The Tribunal accepts the argument of Counsel for the Licensee in view of the fact that the Licensee was charged in Provincial Court under Section 8(4) of the Regulation with permitting drunkenness but, after an extensive trial, was acquitted of this charge, it would be subject to double jeopardy if this matter was dealt with by the Tribunal. We would point out that the hearing before the Liquor Licence Board was held on October 4, 1984 and the Judgment of the Provincial Court was handed down on January 15, 1985, which was before the Decision of the Liquor Licence Board issued on the 22 day of January, 1985. The Tribunal, therefore, finds that based on the Judgment rendered by the Provincial Court with respect to the March 22, 1984 incident, the Licensee had not permitted drunkenness to take place in the licensed premises.

With respect to the various incidents relating to persons charged and convicted of driving with greater than 80 milligrams of alcohol per 100 millilitres of blood, the Tribunal finds that this in itself is not sufficient evidence that the Licensee permitted drunkenness to take place in the licensed premises contrary to Section 8(4) of the Regulation and the Tribunal refers to its decision in the Tweedsmuir Hotel appeal. The Tribunal accepts the argument of counsel for the Licensee that a conviction of impaired driving or blowing over 0.80 is not automatically evidence of intoxication since a person could be impaired for the purposes of driving a motor vehicle without being intoxicated.

The Tribunal finds that upon the evidence filed and upon the admissions of the witnesses of the Licensee, false statements of the sales of food and liquor in the licensed premises were filed with the Liquor Licence Board contrary to Section 8(15) of the said Regulation. The Licensee has admitted that it falsified its food/liquor ratio records for the period from and including March of 1984 to and including July of 1984. One of the exhibits filed with the Tribunal was a report of an investigator of the Board filing the results of the monitoring of the food and liquor sales of the premises for two days on July 20, 1984 and July 21, 1984, which confirmed total food sales for July 20 to be five per cent while liquor sales were 95 per cent of total sales and the food sales on July 21 being three per cent of total sales while liquor sales were 97 per cent of total sales. There was also evidence by one of the principals of the Licensee whereby he admitted under cross-examination that if the Cabaret was unable to employ the food charge program and the combined french fry sales with beer, they would be unable to meet their ratio and he stated that the proper solution was for the Cabaret to obtain an entertainment lounge licence. One of the exhibits filed with the Tribunal was the food/liquor ratio sales for the period from October 19, 1984 to June 1, 1985, and virtually every week from April 13 to June 1, indicated food sales to be 40 per cent of total sales and liquor sales to be 60 per cent of total sales.

The final matter as set out in the Proposal was the question of whether the Licensee was operating its business contrary to Section 8(15) of the Regulation in that the licensed premises were not under experienced management and supervision so as to maintain an orderly operation and this allegation revolves around the excessive use of force by the employees of the Licensee. After reviewing all of the evidence with respect to the various incidents resulting in serious injuries to several patrons, including the very grave injuries to Downey and the evidence of the present and former doormen and floor managers of the Cabaret, the Tribunal finds that there was not proper supervision of the employees and that the Licensee was in contravention of Section 8(15) of the Regulation. The Tribunal finds that excessive force was used on several occasions. The Tribunal recognizes that Paul Malagerio was a hostile witness in that he had been fired immediately after the last hearing before the Liquor Licence Board and the Tribunal has taken this into account in reviewing his evidence. However, his evidence as to the atmosphere within the restaurant and the problems of violence were confirmed by the Licensee's witness, Michael Buffy, who



did not appear to be a hostile witness, and he confirmed the evidence of Malagerio with respect to the atmosphere in the premises and acknowledged the problems of excessive consumption and the type of live entertainment. This witness also confirmed the policy of force when he acknowledged on cross-examination, the instructions to the doormen, "no head shots - just body shots". The evidence also appears to substantiate the allegation that management was more interested in protecting the dancers than it was in protecting the patrons.

The Tribunal rejects the argument of the Board that because of the type of adult entertainment there was a greater onus placed on the Licensee. The Tribunal finds that there is no greater onus or responsibility than on any other Licensee but if the Licensee creates an environment by the type of entertainment it provides, such as nude dancers, there is a greater responsibility on the Licensee to satisfy that onus.

The Tribunal finds that the policy of excessive force was carried on either with the implied consent of management or with management shutting its eyes to what was actually going on. There was also the blatant disregard of the Regulation with respect to the food/liquor ratio which occurred as a result of the direct instructions of management to falsify the records. The records speak for themselves. It has been argued that revocation of a licence is far too severe a penalty, but the Tribunal is of the opinion that there is sufficient evidence to justify the revocation of the licence in this case. All Licensees within the industry must be shown that the use of violence and excessive force cannot be tolerated and that the implied consent to the use of such force, combined with a blatant disregard of the ratio requirements, justifies the revocation of the dining lounge licence.

Accordingly, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, R.S.O. 1980, Chapter 244, the Tribunal confirms the Decision of the Liquor Licence Board dated the 22nd day of January, 1985 revoking the dining lounge licence of 502377 Ontario Limited for the Cabaret Restaurant, Concord, Ontario, and directs the Board to set the effective date for such revocation. \*

\* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by 502377 Ontario Limited. The appeal had not been concluded at the time of this publication.

476535 ONTARIO LIMITED  
(J.B.'S CORRAL RESTAURANT)

APPEAL FROM THE DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE  
DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING  
KENNETH VAN HAMME, MEMBER  
ROBERT COWAN, MEMBER

APPEARANCES:

DAVID E. WATERHOUSE, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF  
HEARING

16 October 1985

Toronto

#### REASONS FOR DECISION AND ORDER

This is an appeal by the Licensee from the Decision of the Liquor Licence Board of Ontario dated the 21st day of March, 1985, whereby the Board attached a "Term and Condition" to the dining lounge licence of the Licensee with respect to its premises known as "J.B.'s Corral Restaurant" at 6282 Lundy's Lane, in the City of Niagara Falls, requiring that the sale and service of alcoholic beverages in the licensed premises shall cease at 10:00 p.m. daily.

The Licensee had originally applied for an entertainment lounge licence to take the place of the presently existing dining lounge licence and on the 26th day of October, 1984. The Board issued a Notice of Proposal to refuse to issue the entertainment lounge licence and to attach the said "Term and Condition". As a result, the Licensee gave notice requiring a hearing which hearing was held before the Board on the 26th day of October, 1984. By a decision dated the 18th day of December, 1984, the Board reserved its decision with respect to the application for the entertainment lounge licence and the proposal to attach a "Term and Condition" pending a review of the operation of the presently licensed dining lounge facilities after January 31, 1985. On the 21st day of March, 1985, the Board apparently took no action with respect to the application for the entertainment lounge licence but attached the said "Term and Condition" which is the subject of this appeal.

The first witness called on behalf of the Board was Steve Holubko, an investigator with the Liquor Licence Board for the past six years. He stated that his duties were to check food/liquor ratios and to determine the method of recording sales and that he made spot-checks on licensed premises throughout the province. The witness testified that he attended at the premises of the J.B.'s Corral Restaurant on October 4, 1984, and his report was filed at page 14 of the Record of Proceedings. The witness stated that he arrived at the premises at approximately 12:40 p.m. and sat at the bar. He stated that there were only a few people in the premises and that no food was being served. He returned at 6:30 that evening and stated that there were very few people eating at that time. He came back to the restaurant on the evening of October 4 at approximately 9:50 p.m. and remained until shortly after midnight. There were many patrons in the premises and entertainment was being offered in the form of country and western bands. Mr. Holubko returned to the premises on the morning of October 5 requesting the books, but was advised that they were not available. He was permitted to review the daily cash sheets and the cash sheets for the month of August, 1984, indicated that food sales represented 7.6 per cent of the total sales while liquor sales represented 92.4 per cent of the total sales. The liquor sales for the month of September, 1984 according to the cash sheets represented 94 per cent of the total sales.

The witness advised that he returned to the premises and monitored total sales for a period of two days on January 31, 1985 and on February 1, 1985. His inspection of the kitchen indicated that there was suitable equipment and adequate food on hand and that cooks were on duty, but that the furnishings in the dining room were not properly set up for dining. He stated that daily specials were advertised and the sales were recorded on one cash register, which register was cleared twice a day. He stated that there were detailed receipt tapes and that records were kept re food purchases on a daily basis. He confirmed that the daily records compared with the reports submitted to the Board, but that the ledgers were still not available to him. The witness advised that he had made a spot-check the day before (January 30, 1985) at which time he had ordered a drink and was charged a night price of \$2.50. The tape for this order showed a liquor purchase of \$1.40 and \$1.10 for mix which was included as a food sale. The witness introduced as evidence the food/liquor ratio reports which were filed for the period from October, 1984 to and including January, 1985, which were as follows:

<u>Month</u>	<u>Liquor Sales</u>	<u>Food Sales</u>
October, 1984	87.5%	12.5%
November, 1984	82.0%	18.0%
December, 1984	76.0%	24.0%
January, 1985	79.0%	21.0%

On cross-examination, the witness confirmed that the record of sales appeared to be accurate and that he had no knowledge that there were not proper sales ledgers for the premises. He confirmed that Mrs. Jean Biasucci, the proprietor of the premises, was present when he attended at the premises in October of 1984. When questioned about the inclusion of mix used in drinks in food sales the witness stated that it often depends on whether the drink is mixed at the bar and that the procedure followed by the Licensee was not unusual. He stated that he had been told that the bookkeeper was instructed in 1984 to prepare a sales ledger but, to his knowledge, this had not been completed. Mr. Holubko stated that in his opinion an 85/15 ratio as required by an entertainment lounge licence could be possible, but that a concerted effort to sell additional food would be required. His conclusion from observing the atmosphere of the dining lounge and the clientele was that the premises and the entertainment offered were not conducive to a dining lounge establishment and stated that in his opinion there should be a separate dining area.

The next witness called on behalf of the Board was Wally Malkiewich who had been an inspector with the Liquor Licence Board for the last 12 years in the Niagara Peninsula area and was familiar with the premises of the Licensee. He stated that he had made 11 visits to the premises during the past year and that the largest number of people he had seen having dinner in the evening was approximately 15 people. The witness stated that country and western music entertainment was provided and that any advertising promoted the music and not the food. When he attended at the premises on July 2, 1985, he was advised that the cook did not come in until 5:00 p.m. and that sandwiches only were served before that time. On May 11, 1985, he attended at the premises at approximately 10:15 p.m. and there were between 175 and 225 people in attendance with no sign of food being served or consumed. There were three barmaids and six waitresses on duty at that time. He stated that only seven to eight tables had a tablecloth and they were very close to the kitchen door and that in his opinion it would be extremely difficult for the Licensee to maintain the 60/40 liquor/food ratio.



On cross-examination, the witness acknowledged that there were menus on the wall behind the bar and that there were as many as 15 food display menus. He stated that he was aware of a management change and that he always gets his full reports. The witness stated that he very often saw Mrs. Biasucci, the proprietor. He confirmed that there were a minimum of 50 restaurants in the area and that competition for the food business was very tough and that these premises would not attract tourists. The witness provided the following breakdown of sales of liquor and food for three days in June and July of 1985 which indicated the inability of the Licensee to meet the proper ratio, which was as follows:

<u>Date</u>	<u>Liquor</u>	<u>Food</u>
June 29, 1985	\$1,842.00 (83.9%)	\$352.00 (16.1%)
June 30, 1985	\$1,683.00 (86.6%)	\$259.00 (13.4%)
July 1, 1985	\$ 344.00 (82.6%)	\$ 72.00 (17.4%)

These figures were apparently taken off the tape. The witness also confirmed that there were too many pinball machines in the premises, there being seven machines while the regulations permitted a maximum of five machines.

The first witness called on behalf of the Applicant was Jean Biasucci, who was the owner of 476535 Ontario Limited and she confirmed that she had no partners in the business. She stated that she had active participation in the operation of the dining lounge and was there every day. She confirmed a staff of 16 with Mr. Michael Daniels being appointed manager in November of 1984. Prior to that, her ex-husband had been the manager but he had left in 1985.

Under cross-examination, Mrs. Biasucci acknowledged that she had been trying to develop a decent menu but that it was hard to achieve a proper liquor/food ratio because food prices were so low in the area and it was impossible to force persons to eat.

Michael Daniels who was the general manager of J.B.'s Corral Restaurant since November of 1984 was called as a witness and stated that he was responsible for the ordering of supplies, the hiring and firing, the payroll, the supervision of the bar and the restaurant, together with marketing and promotion. He stated that he had injected new food items into the menu in January of 1985 and had changed the entertainment from a country and western type of music

to a soft rock and roll. This resulted in a younger type of clientele frequenting the premises and resulted in a demand for "munchy" types of food. He stated that there were many fast food outlets in the area and that it was very difficult to compete with them. He detailed the various attempts that had been made to improve food sales and confirmed that his staff included three full time cooks. The witness confirmed the difficulty that the establishment was having with the ratio and acknowledged that only so much improvement was possible. He also stated that a dining lounge ratio was unrealistic to achieve and that it would be more appropriate to have an entertainment lounge licence. He gave his opinion that the best possible ratio which probably could be achieved would be a 25 to 30 per cent food sale on a constant basis and that this had been determined from his observations of the business after 12 years of experience in the restaurant industry.

Counsel for the Board, in argument, confirmed that the facilities were good and that adequate food was available and that proper books and records had been kept. He referred to the evidence of the manager, Michael Daniels, who summed up the whole issue in that it was unrealistic to expect that the Licensee could achieve the 60/40 liquor/food ratio. As a result, there was no real effort to change the atmosphere and the facilities were conducive to a quick snack. He referred the Tribunal to the average food sales for the period from August of 1984 to September of 1985 as being less than 20 per cent of total sales. He submitted that the Board had been correct in its imposition of the "Term and Condition" and that there was no reason for a change.

Counsel for the Applicant admitted that the proper ratios had not been met and likely would not be met. He submitted that the condition imposed by the Liquor Licence Board was unduly harsh and that it would have a disastrous economic effect as most sales were after 7:00 p.m. He confirmed that an application had been made for an entertainment lounge licence, but that this had been adjourned pending disposition of the appeal of the decision of the Board imposing the "Term and Condition". He argued that the decision of the Tribunal should be deferred until such time as the application for the entertainment lounge licence had been disposed of.



The Tribunal finds that the Licensee has not met the requirements of Section 9(6) of Regulation 581 of the Liquor Licence Act. It would appear that the licensed establishment is being operated as if the Licensee was the holder of a proper entertainment lounge licence. The Tribunal acknowledges that an application for an entertainment lounge licence has been pending for some time but the Tribunal must look at the facts as they relate to the present licence.

Accordingly, by virtue of the authority vested in it under section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the decision of the Liquor Licence Board dated the 21st day of March, 1985 and directs the Board to set the date of commencement of the said "Term and Condition". However, the Tribunal recommends that in view of the evidence introduced before the Tribunal, the implementation of the "Term and Condition" be deferred pending a decision by the Liquor Licence Board on the application for the entertainment lounge licence.

GOLD KEY RESTAURANT LIMITED  
(LATIN QUARTER II RESTAURANT)

APPEAL FROM A DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

THAT UNLESS CERTAIN REQUIREMENTS WERE SATISFIED  
THE ENTERTAINMENT LOUNGE LICENCE WOULD BE SUSPENDED

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
NEIL VOSBURGH, MEMBER

APPEARANCES:  
RICHARD I. KESTEN, representing the Applicant  
S.A. GRANNUM, representing the Liquor Licence Board

DATE OF  
HEARING: 29 October 1986  
Toronto

# REASONS FOR DECISION AND ORDER

This is an appeal by the Gold Key Restaurant Limited, Licensee of Latin Quarter II Restaurant situate at 2 Melanie Drive, Unit #10, Brampton, Ontario from the Decision of the Liquor Licence Board of Ontario dated the 20th day of February, 1986, suspending the Entertainment Lounge Licence of the Licensee unless the indebtedness of \$31,308.73 being arrears of fees payable under the said Entertainment Lounge Licence, together with other requirements as set out in the Decision of the Board were satisfied by March 17th, 1986. The Board had originally issued a Notice of Proposal on October 29th, 1985, and as a result of that Notice of Proposal, the Licensee requested a hearing which request was dated November 28th, 1985.

The Liquor Licence Board held a hearing on February 20th, 1986, after a request for one adjournment which had been granted, and the Decision of the Board which was issued on that date is the subject of the appeal to this Tribunal. The Applicant acknowledges that the said balance of \$31,308.73 is due and owing, and advised that the purpose of the appeal to the Tribunal was primarily to obtain an Order granting a time for payment. The Tribunal finds upon the evidence before it that the Licensee is in default of payment of the sum of \$31,308.73 as set out in the Notice of Proposal.

Therefore by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal varies the Decision of the Liquor Licence Board dated the 20th day of February, 1986, and directs the Licensee to pay the sum of \$1,000.00 per week on account of the arrears of licence fees of \$31,308.73 plus interest with the first payment to be made on or before Monday, November 3rd, 1986, and payable \$1,000.00 weekly thereafter until the said sum of \$31,308.73 plus interest has been fully paid. In the event the Licensee fails to make weekly payments as provided under this Decision and is in default for more than 3 days, the Tribunal directs the Board to forthwith suspend the said Entertainment Lounge Licence of the Licensee until the total balance of \$31,308.73 plus interest has been paid. In addition, the Licensee shall pay any balance owing for fees for beer purchases for the months of September and October 1985 on or before November 10th, 1986 and the failure to pay any such arrears shall entitle the Board to suspend the said licence forthwith.

EDWARD HINSCHBERGER

APPEAL FROM THE ORDER OF INTERDICTION OF  
THE LIQUOR LICENCE BOARD

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
DR. STUART E. ROSENBERG, MEMBER  
ROBERT COWAN, MEMBER

APPEARANCES:

S.A. GRANNUM, representing the Liquor Licence Board

No one appearing for the Applicant

DATE OF

HEARING: 3 November 1986

Toronto

REASONS FOR DECISION AND ORDER

To the best of this panel's knowledge, this is the first appeal to this Tribunal from an Order of the Liquor Licence Board made under section 34 of the Liquor Licence Act prohibiting the sale of liquor to an individual. It is therefore regrettable that the Applicant, Edward Hirschberger, did not appear on the appointed date to present his case.

Section 34(1) of the Liquor Licence Act reads as follows:

34-(1) Where it is made to appear to the satisfaction of the Board that a person, resident or sojourning in Ontario, by excessive drinking of liquor, misspends, wastes or lessens his estate, or injures his health, or interrupts the peace and happiness of his family, the Board may make an order of interdiction prohibiting the sale of liquor to him until further ordered.

The Record of Proceedings before the Liquor Licence Board which was filed as Exhibit 4 in this hearing, contains a letter dated September 29, 1985, from the common law spouse of Mr. Hirschberger wherein she requests that an interdiction order be made. The letter reads in part as follows:

I find that it is necessary to have Mr. Edward Henschberber (sic) placed on your inter-active list, a [sic] he is a great hazard while driving on the highways. His health is also suffering, mentally and physically, due to his excessive drinking. Also my thirteen year old daughter is under a great deal of mental strain. Her school work is suffering and she is currently having sessions with a guidance counselor...

...He is the owner, and principal driver, of a taxi business here in Deep River. We have been living together for the past five years...

He had been convicted for drunk driving in 1984 and had his driver's license suspended. He didn't learn anything from that experience...

...I find that my strength is starting to fail, I just cannot continue to work and think for two people. We just cannot seem to get the message across to him that he is a danger to other drivers on the highways. He should realize this himself, as he was an officer with the Ontario Provincial Police force.

He received a letter from the mayor of Deep River stating that the taxi license would be revoked if he was caught drunk driving again. This is the only income that we have coming in to keep a roof over our heads, which I find difficult at times, due to the fact that business isn't that busy, mainly because it is common knowledge in this area, that he has a drinking problem and people are afraid to drive with him...

We also drive school children too [sic] and from school by taxi. I am in constant fear that he will drive them when he has been drinking. Frequently he forgets to pick them up after school, due to his drinking, then I have to call in the spare taxi driver to go for them...

The common law spouse did not attend this hearing. The only witness called on behalf of the Liquor Licence Board was one of its Inspectors, Andy Willett. It was his testimony that he had spoken with Mr. Hinschberger about the convictions against him for driving while impaired and that Mr. Hinschberger had offered no excuses for his behaviour. Mr. Willett also testified that he had met with the O.P.P. officers in the area and the Chief of Police in Deep River. The latter had advised him that there had been talk at the beginning of the school term that Mr. Hinschberger had been drinking on days when he was required to pick up children to drive them to and from school, but that now a different driver was doing this. It also appears that Mr. Hinschberger continues to purchase liquor and beer both for himself and others at the local liquor store and Brewers Retail outlet.

Although the Tribunal has some concerns about the constitutionality of Section 34 in light of the Charter of Rights, this issue was not raised and the Tribunal has therefore proceeded on the basis that this section is valid provincial legislation.

The Tribunal accepts the unrefuted evidence, such as it is, that Mr. Hinschberger has a drinking problem and that it is affecting not only the peace and happiness of his family, but his earning capability as well. The Tribunal is of the opinion that the Liquor Licence Board had reasonable grounds upon which to satisfy itself that the Interdiction Order should be issued. Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Order of Interdiction issued by the Liquor Licence Board of Ontario dated the 15th day of April, 1986 wherein the Board ordered that the sale of liquor to Mr. Hinschberger be prohibited until further order by the Board.

The Tribunal notes that under Section 35 of the Liquor Licence Act, a person in respect of whom an Order of Interdiction has been made, may apply to the Liquor Licence Board at any time to show that circumstances of the case do not warrant the making of the Order or one year after the Order has been made if the person has refrained from drunkenness during that period.



JIM WONG'S TAVERN LIMITED  
(JIMMY'S PLACE TAVERN)

APPEAL FROM THE DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE  
DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING  
DR. STUART E. ROSENBERG, MEMBER  
RONALD CHEMIJ, MEMBER

APPEARANCES:

DAVID B. BLACK, Q.C. representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF  
HEARING: 28 November 1985

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by the Licensee from the Decision of the Liquor Licence Board of Ontario dated the 28th day of March, 1985, whereby the Board attached a "Term and Condition" to the dining lounge licence of the Licensee in respect of its premises known as "Jimmy's Place Tavern" situate at 951 Lakeshore Road East, Mississauga, Ontario, requiring that the sale and service of alcoholic beverages in the licensed premises shall cease at 11:00 p.m. daily.

The Board originally issued a Notice of Proposal on the 29th day of May, 1984, whereby it proposed pursuant to Section 10(3) of the Liquor Licence Act to revoke the dining lounge and patio dining lounge licences of the Licensee. A hearing was held at the request of the Licensee on the 7th day of August, 1984 and was adjourned until the 28th day of March, 1985 to allow the Licensee an opportunity to conform to the liquor licence ratio and rectify other discrepancies in its operation. After a further hearing on the 28th day of March, 1985, the Board issued its Decision attaching the said "Term and Condition".

The first witness called on behalf of the Board was Jaroslav Wilk who was an Inspector with the Liquor Licence Board for the past 17 years and had inspected the Licensee's

premises for the past three to four months. He gave evidence and identified exhibits including the menus for the premises. He confirmed that the equipment appeared to be adequate for the operation of a dining lounge and that the restaurant was located close to a small plaza. He stated that most of the patrons were industrial workers from the Lakeshore area. He identified a stage which was used for topless entertainment after 4:30 p.m. from Monday to Saturday, inclusive, each week. He stated that the premises were operated by Mr. and Mrs. Wong and that there were approximately 12 to 15 persons for lunch on the last date that he made an inspection. The witness stated that he had checked the premises on seven or eight occasions and found that the food items were very inexpensive and, in his opinion, made it difficult for the Licensee to meet its liquor/food ratio. The witness stated that most patrons came in for a snack together with a couple of beers and not for meals.

On cross-examination, the witness stated that Mr. and Mrs. Wong appeared to be competent proprietors and that there was a reasonable selection of food, but the problem was that most customers wanted to drink and the Licensee was not able to charge high prices for food in that district because of the competition. There were several other restaurants in the immediate area.

The Applicant called as its only witness James Wong, one of the principals of the Licensee corporation. He stated that he worked on a full time basis with his wife in operating the dining lounge and that he was fully trained to operate the kitchen. He stated that they had their first problems in March of 1984 and since that time had made various changes to the menu together with their program to increase the sale of food. He stated that they had many specials and that he changed the menu every week. He stated that he did no advertising other than in the window of the premises. The witness stated that when patrons came into the premises they were always asked if they wanted a menu and most said, "No". On cross examination the witness acknowledged that entertainment in the form of topless dancers was provided and that if there was no entertainment, there would be no business. He confirmed that entertainment started daily at 4:30 p.m. and that business was very competitive in the area.

Counsel for the Board filed as an exhibit the food/liquor ratios for the period from January of 1984 to September of 1985, inclusive, and the exhibit indicated that the ratio problem began in August of 1984 when liquor sales

were 80 per cent of total sales. The exhibit indicated that the only month that the Licensee came close to achieving the proper ratio was in March of 1985 when food sales were 39.6 per cent of total sales.

Counsel for the Board, in argument, referred to Exhibit 6 which was the food/liquor ratio report for the period from January of 1984 to September of 1985. He pointed out that the hearing before the Board on the original Proposal was adjourned for a period of six months from August of 1984 to March of 1985 in order to permit the Licensee to attempt to comply, but there still had been no compliance with the Regulation and it was apparent that the Licensee could not comply with the Regulation because of the type of operation that the Licensee was conducting. Counsel confirmed that all other problems relating to the Licensee's operation which had resulted in the original Notice of Proposal to revoke had been rectified and that the only continuing problem was the failure to meet the food/liquor ratio.

Counsel for the Applicant argued that it was apparent that the Licensee was doing as much as it possibly could. He submitted that Section 9(6) of Regulation 581 under the Act was arbitrary and unfair. Only the customer can decide whether he wishes to purchase food or liquor or a combination thereof. He stated that the legislation gives the Lieutenant-Governor in Council the power to pass regulations under Section 39 of the Liquor Licence Act, but to pass a regulation which requires a certain ratio is arbitrary and unfair when it is the customer who will choose. Counsel argued that the Regulation is a bad Regulation and should be changed. He acknowledged that it was difficult for the Licensee to increase its food ratio. He submitted that in view of the true meaning of the Regulation the Tribunal should find it to be an incompetent Regulation and refuse to enforce it.

Counsel referred to the Decision of the Liquor Licence Appeal Tribunal in the appeal of The Red Velvet Restaurant reported in Volume 5, page 63, of the Summaries of Decisions where the Tribunal, on the merits of that case, allowed the appeal and revoked the Decision of the Liquor Licence Board imposing a "Term and Condition". He argued that the Licensee was making a bona fide effort and in the circumstances there had been a significant improvement in the ratio.

In reply, counsel for the Board argued that only the Legislature can change the legislation and that Section 9(6) of Regulation 581 is mandatory. He stated that if an

establishment cannot comply with the Regulation, it ought not to have a licence. He pointed out that the Board had been lenient with the Licensee in that the usual "Term and Condition" which is imposed is to prohibit the sale of alcoholic beverages after 10:00 p.m.

After reviewing all of the evidence, the Tribunal is of the opinion that the Decision of the Liquor Licence Board dated March 29, 1985 should be confirmed. It is acknowledged by all parties that the Licensee has not met the proper ratio as required by Section 9(6) of Regulation 581 of the Liquor Licence Act and that such failure to comply has continued to date. The Licensee should have known of the requirements of the Regulation when it applied for the licence and of the continuing responsibility on the Licensee to meet the ratio. It is true that the customer may decide when he comes into licensed premises whether he will purchase food or liquor, but there is evidence before the Tribunal that the type of atmosphere created by the Licensee induces drinking on the part of most customers as opposed to dining. In the Red Velvet Restaurant decision, the Tribunal was of the opinion that there had been sufficient bona fide attempts made to achieve compliance with the Regulation such as the implementation of a breakfast trade but, in this appeal, the attempts of the Licensee to promote the sale of food are negated by the type of entertainment offered.

The Tribunal finds that the Licensee has not met the requirements of Section 9(6) of Regulation 581 of the Liquor Licence Act. Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 29th day of March, 1985 and directs the Board to set the date of commencement of the said "Term and Condition". \*

\*Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by Jim Wong's Tavern Limited (Jimmy's Place Tavern). The appeal had not been concluded at the time of this publication.

RACHELLE and DORIAN LABELLE  
(MARKSTAY TAVERN)

APPEAL FROM THE DECISION AND ORDER OF  
THE LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LIQUOR LICENCE (LOUNGE)

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING  
KENNETH VAN HAMME, MEMBER  
ROBERT COWAN, MEMBER

APPEARANCES:

S. A. GRANNUM, representing the Liquor Licence Board

No one appearing for the Applicants

DATE OF

HEARING: 15 October 1986

Sudbury

#### REASONS FOR DECISION AND ORDER

This is an appeal by Rachelle and Dorian Labelle, the Licensees of the Markstay Tavern, Markstay, Ontario, from the decision of the Liquor Licence Board dated the 7th day of January, 1986 whereby it suspended the liquor licence of the Licensees for a period of fourteen days.

The Board had originally issued a Notice of Proposal on the 25th day of April, 1985 whereby, because of the past conduct of the licence holders, there were reasonable grounds for belief that the business of the Licensees would not be carried on in accordance with law in that, contrary to Section 43 of the Liquor Licence Act, the licence holders permitted liquor to be supplied to persons in an apparently intoxicated condition. Secondly, contrary to Section 8(4) of Regulation 581 of the Act, the licence holders permitted drunkenness and disorderly conduct to take place on the licensed premises. The Licensees requested a hearing before the Board. This hearing was held on the 7th day of January, 1986 and the decision rendered.

On hearing the evidence which has been submitted this morning, the evidence of Constable Fitzgerald of the Ontario Provincial Police, the Tribunal is of the opinion that there has been a lack of management and control on the

part of the Licensees in that they have served intoxicated persons and have permitted drunkenness and disorderly conduct on the premises.

The Tribunal finds that there are reasonable grounds for belief that the business of the Licensees, the operation of the Markstay Tavern, would not be carried on in accordance with law as set out in the Notice of Proposal.

Therefore by virtue of the authority vested in it under section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the decision of the Liquor Licence Board dated the 7th day of January, 1986 whereby it suspended the liquor licence of the Licensees for a period of fourteen days and the Tribunal directs the Board to set the date of commencement of the suspension.



GORDON JOHN MECKE  
(PARIS TAVERN)

APPEAL FROM THE DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING  
DR. STUART E. ROSENBERG, MEMBER  
RONALD W. CHEMIJ, MEMBER

APPEARANCES:

GORDON JOHN MECKE, appearing on his own behalf

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 23 June 1986

Toronto

# REASONS FOR DECISION AND ORDER

This is an appeal by Gordon John Mecke, the Licensee of Paris Tavern, from the Decision of the Liquor Licence Board of Ontario dated the 24th day of October, 1985, whereby the Board suspended the lounge licence of the Licensee for a period of four days.

The Board originally issued a Notice of Proposal on the 18th day of July, 1985, whereby it proposed to suspend both the dining lounge and lounge licences of the Licensee for a period of 14 days. The Licensee requested a hearing before the Board and this hearing was held on the 24th day of October, 1985, at which time the Board rendered its Decision suspending the lounge licence for the four day period.

There were three incidents referred to in the Notice of Proposal.

The first, an incident on the 5th day of May, 1985, whereby charges were laid with respect to the contravention of Section 9(22) of the Regulation, in that "all evidence of the service and consumption of liquor was not removed from the licensed premises within 45 minutes after the sale and service of liquor in the licensed premises ought to have ceased". These charges were subsequently withdrawn.

There were also charges laid with respect to an incident which occurred on the morning of June 15th, 1985, whereby contrary to Section 9(23) of the Regulation, the licensed premises "were not cleared of patrons within 45 minutes after the sale and service of liquor ought to have ceased". The Licensee was charged and convicted of this offence in Provincial Court and paid a fine of \$300.00.

There is a third incident which occurred on the evening of June 15th, 1985, whereby the licence holder was alleged to have permitted a person apparently under the age of nineteen years to be on the premises licensed as a lounge. The individual was convicted but there was no conviction against the Licensee with respect to this incident.

The Applicant has stated in this hearing this morning that only the incident of June 15th is relevant since the other charges were withdrawn against the Applicant, although the Applicant acknowledges the facts with respect to the two other incidents.

The Tribunal notes that the Board in its Decision of October 24th, 1985, substantially reduced the penalty in that the original penalty was a suspension of both the lounge and dining lounge licences for a period of fourteen days.

The Tribunal finds on the evidence before it this morning that the Licensee did in fact carry on activities contrary to the Act and the regulations thereunder as set out in the Notice of Proposal. The Tribunal feels that the Board in its Decision of October 24th, 1985, has taken into account the circumstances surrounding all of the events.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated October 24th, 1985, and directs the Board to set the date of commencement of the said suspension subject to the provision that the suspension shall commence on a Monday.

CHARLES BERTRAND PECK  
(CHARLIE'S ROADHOUSE RESTAURANT)

APPEAL FROM THE DECISION AND ORDER OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE  
DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING  
BARBARA J. NICHOLS, MEMBER  
NEIL E. VOSBURGH, MEMBER

APPEARANCES:  
HOWARD S. BUCKMAN, representing the Applicant  
S. A. GRANNUM, representing the Liquor Licence Board

DATE OF  
HEARING: 13 May 1986 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Charles Bertrand Peck, the Licensee of Charlie's Roadhouse Restaurant, situate at 94 Dunkirk Street, St. Catharines, Ontario, from the Decision of the Liquor Licence Board of Ontario dated the 12th day of July, 1985, whereby the Board attached a term and condition to the Dining Lounge Licence of the Licensee that the sale and service of alcoholic beverages in the licensed premises shall cease at 10:00 p.m. daily until otherwise ordered by the Board.

The Board originally issued a Notice of Proposal on the 28th day of January, 1985, whereby it proposed to attach the said term and condition and the Licensee requested a hearing before the Board. This hearing was held on the 7th day of March, 1985, and the Board subsequently rendered its Decision on July 12, 1985, attaching the said term and condition.

Counsel for the Board filed as an exhibit a summary of the food/liquor ratio reports for the period from and including January of 1984 to and including December of 1985, which reports showed the total liquor sales to be a minimum of 69.8 per cent of total sales and a maximum of 91.9 per cent of total sales. The reports indicated that the best

month for food sales in the whole of 1985 was the month of May where the total food sales amounted to 20.5 per cent of total sales.

Counsel for the Board called as a witness Craig Mehlenbacher, who was an Inspector with the Liquor Licence Board and whose territory included Charlie's Roadhouse Restaurant in St. Catharines. The witness gave evidence as to his observations of the restaurant and confirmed that at the time of his various attendances at the premises, food sales were practically non-existent. He stated that the majority of the business was in the evening when the restaurant offered country music entertainment although, on cross-examination, he confirmed that he had never attended at the restaurant after 5:00 p.m. He stated that the kitchen facilities were adequate and that the food was good and that, in his opinion, the owner was attempting to improve the ratio.

The only witness called on behalf of the Applicant was the proprietor, Charles Bertrand Peck, who had owned the premises since September of 1982. He confirmed that he was the sole owner and proprietor and had taken over the business from The Federal Business Development Bank in return for payment of back rent of \$1,600.00. Mr. Peck testified that he had invested capital for equipment and furnishings to a total of \$127,000.00 and presently had eight full and part-time employees. He stated that he was in charge of the premises and that he had a full-time manager, but that he was present every day and night that the restaurant was open. The witness stated that he had never been able to meet the food/liquor ratio as required by the Regulation under the Liquor Licence Act since the time he had begun operating the restaurant and confirmed that the figures as set out in Exhibit 6 and filed on behalf of the Board were correct. He stated that there was virtually no business until after 8:00 p.m. each evening and that the really busy time commenced between 10:30 p.m. and 11:00 p.m. and continued until closing time at 1:00 a.m.

The witness gave evidence as to the various attempts to improve food sales including the giving of coupons, advertisements in the St. Catharines paper, placemat menus and changes in the type of food to more finger foods. The witness stated that the food/liquor ratio reports for January, February and March had just been filed in early May of 1986 and they indicated an increase of between four and five per cent in the ratio of food sales. The witness stated that if he was forced to suspend the sale of liquor at 10:00 p.m., he would be put out of business as he could not afford to have a live band for a period of one hour only.

On cross-examination, the witness acknowledged that he knew of the ratio and that he had been warned by the Board as early as 1984 when a Notice of Proposal was originally issued.

At the original hearing before the Liquor Licence Board in March of 1985, the matter had been adjourned until July in order to allow him to attempt to meet his ratio.

Counsel for the Board argued that the Licensee had acknowledged the correctness of the food/liquor ratio reports which had been filed before the Tribunal and that he was unable to meet his proper ratio. Counsel pointed out that Section 9(6) of Ontario Regulation 581 of the Liquor Licence Act is mandatory and that the Board had had no alternative or reason not to enforce the regulation.

Counsel for the Applicant reviewed the continued efforts by the Applicant to improve his ratio, and stated there had been a misguided calculation of his ability to meet the ratio. He stated that there was a possibility of an arms-length sale in the near future and that the Licensee should be granted a period of time to make an increased effort to achieve a proper food/liquor ratio.

The Tribunal is satisfied that the Licensee has made an honest attempt to increase his food sales, but the Tribunal is bound by the provisions of the Liquor Licence Act and its Regulation and in view of the evidence before it, which has been admitted by the Licensee, the Tribunal finds that the Licensee has failed to meet the food/liquor ratio requirements of Section 9(6) of Regulation 581 of the Liquor Licence Act and is a long way from meeting the proper ratio. There is a procedure whereby the Licensee can apply for the removal of the term and condition if he is able to achieve a proper food/liquor ratio.

Accordingly, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 12th day of July, 1985 and directs the Board to set the date of the commencement of the said "Term and Condition".

BURNS H. PROUDFOOT

APPEAL FROM THE DECISION OF THE LIQUOR LICENCE BOARD

to amend the Terms and Conditions by extending the hours of service from 10:00 to 11:30 p.m.; to permit live entertainment in the form of unamplified instruments; the local community to be advised of any request for renewal of licence or request for transfer of licence.

RE:

PICCOLO CASTELLO TRATTORIA LTD.  
(PICCOLO CASTELLO TRATTORIA RESTAURANT)

TRIBUNAL: MARY G. CRITELLI, VICE-CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
DENNIS J. EGAN, MEMBER

APPEARANCES:

BURNS H. PROUDFOOT, appearing on his own behalf and representing the Nottawaga Creek Ratepayers Association  
Applicant

E.P. FIKSEL, representing the  
Piccolo Castello Trattoria Restaurant

S.A. GRANNUM, representing the Liquor Licence Board

GLENN SWANICK, representing the  
Wahnekewening Beach Association

PAUL BUTTERS, representing the  
North Nottawaga Beach Cottage Owners Association

KATHRYN SPEERS, representing the  
Tiny Township Ratepayers Association

DATE OF

HEARING: 4 September 1986

Midland

# REASONS FOR DECISION AND ORDER

This was a hearing before the Tribunal held pursuant to Section 14 of the Liquor Licence Act. The hearing was required by Mr. Burns Proudfoot who is aggrieved by the decision of the Liquor Licence Board dated April 17th, 1986, made after a hearing held pursuant to Section 12(3) of the



Act. That hearing was held to consider whether certain terms and conditions attached to the Dining Lounge Licence of Piccolo Castello Trattoria Ltd. in respect of Piccolo Castello Trattoria Restaurant ought to be removed.

The Licensee applied for the removal of "terms and conditions" which in effect required the sale and service of liquor in the restaurant to stop at 10:00 p.m. daily and which prohibited live entertainment in the restaurant. The Board's Decision in effect removed these terms and conditions and replaced them with terms and conditions which in effect required the sale and service of liquor in the restaurant to stop at 11:30 p.m. and which permitted unamplified live entertainment in the restaurant.

The authority to remove terms and conditions attached to a licence is found in Section 9(2) of the Liquor Licence Act which provides:

(2) The Board may, on the application of the holder of a licence or permit, remove any term or condition to which the licence or permit is made subject under subsection (1) where there is a change of circumstances.

The first issue, accordingly, that the Board had to consider and that this Tribunal must consider is whether there has been a "change of circumstances" within the meaning of the statutory provision. Unless there has been such a change, the terms and conditions cannot be removed.

It was submitted to this Tribunal that, in order for there to be a "change of circumstances", there must be a change in the character of the surrounding neighbourhood. In this instance, the character of the neighbourhood was and remains essentially that of a residential cottage area. The Tribunal does not accept the submission that the meaning of the term "change of circumstances" is so restricted. The Tribunal is of the view that any change in circumstances relevant to the terms and conditions attached to the licence may be considered.

The Board found as a fact that there had been a change in circumstances as the Licensee had enclosed the former licensed patio and surrendered the patio licence. The Tribunal also heard evidence relating to this structural change and takes the view that the change would reduce the likelihood of noise and people spill-over into the surrounding neighbourhood.

It is, accordingly, a relevant change which brings the Licensee's application for removal of the terms and conditions within the purview of Section 9(2).

Having made this determination, the issue the Tribunal must decide is whether it was appropriate in this case for the Board to remove the terms and conditions originally attached to the licence and replace them with the terms and conditions referred to above.

The Tribunal heard the evidence of Mrs. Strobel who has a cottage directly across from the restaurant. Mrs. Strobel complained of noise, increased traffic and unauthorized parking. Under cross-examination of this witness, the fact was revealed that there is a public beach approximately 500 feet from the restaurant. There was no clear cut evidence linking the complaints of this witness to the restaurant alone and the Tribunal finds as a fact that at least part of the noise, traffic and unauthorized parking results from the use of the public beach.

Mr. Paul Butters gave evidence on behalf of the North Nottawaga Beach Cottage Owners Association. The members of that Association are the owners of ten cottages along the beach road. The closest cottage to the restaurant would be a distance of approximately 400 to 500 feet from the restaurant. The Association opposes the extension of hours to 11:30 p.m., but does not oppose unamplified live entertainment in the restaurant. Some members of the Association are patrons of the restaurant and the Association admits that the restaurant is well managed. Mr. Butters described it as an "enhancement" to the area. Mr. Butters testified that the 10:00 p.m. closing was suitable for a residential neighbourhood. The Association wants to preserve the present nature of the neighbourhood. The Association did advise the Tribunal in its submission that it could accept an 11:00 p.m. closing as a compromise.

The Tribunal recognizes the legitimate concerns of the members of the Association. However, on the evidence before it, the Tribunal cannot find any factual basis for their apprehension that an extension of hours from 10:00 p.m. to 11:30 p.m. will change the character of the neighbourhood.

The witness Glenn Swanick testified on behalf of the Ahnekewening Beach Association which has 100 members. The Association does not oppose the extension of hours or the permission for unamplified live entertainment. The witness expressed his Association's desire to see that noise is kept

inside the restaurant and that music cannot be heard from the street. He stated that noise was not a major problem at present except, perhaps, to persons right next to it.

Mr. Proudfoot, who required the hearing to be held, did not testify at the hearing before the Tribunal.

In support of the Decision of the Liquor Licence Board, the Tribunal heard the evidence of Mrs. Pingitore, one of the co-owners of the licensed premises. She testified that the restaurant is a family-run operation. She testified that no liquor is permitted to be taken out of the restaurant and intoxicated persons are refused service. Since the restaurant opened in June 1984, she has only had to call in the police on one occasion; this being as the result of the refusal of service to an intoxicated person. Many of her customers have complained about the 10:00 p.m. closing time. On week-ends, the majority of her customers arrive after 9:00 p.m. Since June of 1986, the restaurant has been operating until 11:30 p.m. and no complaints about noise or disturbances have been received by the restaurant owner.

The Tribunal next heard the evidence of Mrs. Katherine Speers who is a full time resident of the area and who lives directly across the street from the restaurant at the southeast corner of the intersection, together with her husband and two sons aged 10 and 5. Mrs. Speers testified on behalf of the Tiny Township Ratepayers Association which supports the extension of the hours for service of liquor to 11:30 p.m. Mrs. Speers stated that she was ecstatic when the restaurant was built as the previous structure had been a run down eyesore. She testified that she had not noticed any appreciable difference in noise since the restaurant opened. The restaurant operation has never disturbed her or her family. She testified that there is more noise in the neighbourhood in the summer largely due to summer cottage traffic. Mrs. Speers testified that it was a "treat" for full time residents to have a convenient family restaurant nearby, particularly in the winter months. Since June of 1986, when the hours of operation were extended, she had not noticed any increase in noise.

The final witness called was Mr. Henry Robinson, an Inspector for the Liquor Licence Board. He described the restaurant as a very good operation with no problems whatsoever. He testified that the restaurant was a family oriented gathering place.

Also before the Tribunal were a number of letters that had been put before the Liquor Licence Board at its hearing on April 8th, 1986, and which are referred to in the Decision of the Board. In addition, the Tribunal had before it a letter dated August 31st, 1986, from the Nottawaga Creek Ratepayers Association stating the opposition of the majority of its members to the Decision of the Liquor Licence Board. The letter expressed concerns about noise, traffic, parking and impaired drivers.

After carefully weighing all of the evidence before it, the Tribunal has determined that the Decision of the Liquor Licence Board ought to be confirmed.

The Licensee runs a well-managed establishment that, on a consideration of all the evidence, cannot be found to have created any disturbance to the neighbourhood to date. The Tribunal is not persuaded that the extended hours will cause a change in the character of the neighbourhood.

The Tribunal also notes that the Board ordered as part of its Decision that before the licence is renewed in 1988, notice of the renewal must be sent to all of the objectors at the hearing before the Board so that they may have the opportunity to object to the renewal if they so desire. Furthermore the Board ordered that notice of any application for the transfer of the licence be given to all persons who had notice of the hearing before the Board.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 17th day of April, 1986.

NUNO SANTOS  
(HELEN'S GARDEN RESTAURANT)

APPEAL FROM THE DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING  
KENNETH VAN HAMME, MEMBER  
DENNIS J. EGAN, MEMBER

APPEARANCES:

ALAN A. GLASS, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 6 February 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by the Licensee from the Decision of the Liquor Licence Board of Ontario dated the 20th day of June, 1985, whereby the Board ordered the suspension of the dining lounge licence of the Licensee in respect of its premises known as "Helen's Garden Restaurant" situate at 1180 Queen Street West, Toronto, Ontario, for a period of seven days.

The Board originally issued a Notice of Proposal on the 29th day of April, 1985, whereby it proposed pursuant to Section 10(3) of the Liquor Licence Act to suspend the dining lounge licence of the Licensee for a period of 14 days. A hearing was held at the request of the Licensee and as a result of the said hearing, the Board issued its Decision suspending the said licence for a period of seven days.

The only witness called on behalf of the Liquor Licence Board was Douglas Grady, a Sergeant with the Metropolitan Toronto Police Department. He stated that he had entered the premises in plain clothes at 11:15 p.m. on the evening of February 15, 1985 and took a seat at the service counter. There were approximately 20 patrons in the restaurant at the time and he testified that the bartender was Maria Santos, the wife of the Licensee, and the waiter was Mateus Rocha. The witness stated that he observed a customer sitting on a stool to the right of him who appeared to be extremely intoxicated. The customer's head was bobbing and his speech was slurred. He ordered a beer while at the



bar and was served while obviously intoxicated in the opinion of the witness. The patron finally left the bar and had to be assisted to the door by another patron.

Sergeant Grady testified that shortly after midnight a patron, who he later identified as Raposo Medeiros, approached the bar and ordered a beer and a shot of liquor. He was carrying on a conversation in a very loud voice and was unsteady on his feet. The witness stated that Medeiros bumped into several patrons as he approached the bar. He was served the shot of liquor by Maria Santos and immediately turned after raising his glass and drank the liquor. The beer was served to him by the waiter Rocha. The witness stated that in his opinion Medeiros was obviously intoxicated.

Sergeant Grady observed three other patrons in the premises at that time. One, Terrence Dunn, was sitting at a table with two women patrons and was served, while in a very intoxicated condition, by the waiter, Rocha. There were also two other persons with Medeiros; one, Gaetano Battisti, and the other, Joe Romano. Battisti was having an argument at the table where he was sitting with a person attempting to sell him a watch and there was a lot of loud haggling. He had two bottles of beer on his table and he ordered and was served another bottle of beer by Maria Santos. When he stood up during the course of his negotiations over the watch, the witness stated that he was very unsteady on his feet and appeared to be very intoxicated. The other patron was Joe Romano who was served two bottles of beer and one shot of liquor during the period he was observed by Sergeant Grady. He was very vocal and when he went to the washroom he needed both hands to steady himself by holding onto the chairs and the walls of the corridor. The witness stated that when Romano returned from the washroom he was in a very dishevelled condition.

At 12:30 a.m. on the morning of February 16, 1985, approximately one hour after Sergeant Grady arrived at the restaurant, three other police officers entered the premises and after consultation with Sergeant Grady various charges were laid. Both Maria Santos, the bartender, and Mateus Rocha, the waiter, were served with summonses and were charged with serving persons in an apparently intoxicated condition. Neither of these charges have been dealt with by the Court.

Sergeant Grady advised that he was present and in Court when Gaetano Battisti was convicted of being intoxicated in a public place and fined \$50.00. Raposo Medeiros was similarly convicted and fined \$25.00 and Joe



Romano was given a conditional discharge. The similar charges against Terrence Dunn were withdrawn after evidence was given that he had just come in from working a long shift.

Sergeant Grady also testified of an incident which occurred on the evening of January 13, 1986 in the premises as reported by Constable Redquest of the Metropolitan Toronto Police Department. Constable Redquest entered the premises on the evening of January 13 at approximately 9:05 p.m. where he noted one, Derrick Goulding who appeared to be under the age of 19 years. He had no identification. It was determined that he was 18 years of age, having been born on October 7, 1966. He was charged with drinking while under age, but the charge was withdrawn because of the co-operation he gave to the Police Department with respect to more serious charges that were laid in another matter. Constable Redquest warned Maria Santos, who appeared to be in charge at the time, regarding the apparent appearance and presence of an underage drinker, but no charges were laid against her.

Under cross-examination, the witness expanded on his evidence with respect to the elderly patron who was sitting at the bar and testified that the patron had little control over his head movements and in his opinion was very intoxicated. He acknowledged that his condition was similar to that of Terrence Dunn, but stated that he was subsequently satisfied that Dunn was suffering from fatigue after a long day's work. The witness agreed that the strong odour of alcohol, alone, was not evidence of intoxication. He stated that he saw the elderly patron, whom he referred to as a "grizzled veteran", walk to the washroom and that he had to put his hands on the walls of the corridor in order to reach the washroom. When he left the premises, he was able to walk to the wall, a distance of about five to six steps, and he was assisted from the premises by another patron.

The witness stated that Raposo Medeiros walked to and from the bar on his own and required no assistance but, in the opinion of the officer, he had to lean against the bar to steady himself. The conduct of Medeiros was one observation of the witness that led to his belief that Medeiros was intoxicated. He stated that Medeiros was making several suggestive comments to female patrons in the bar, but he had no record of these comments in his notes. He stated that Medeiros was the party who assisted the older patron when he left the premises.

Under cross-examination, the witness stated that Gaetano Battisti was shouting in a very loud voice when standing at the table in discussions over the purchase of the

watch and that he used the table to steady himself. He stated that the arrests were made by the other officers on their own after making their own observations and after discussion with Sergeant Grady.

With respect to the underage patron, Derrick Goulding, the police officer had been advised by Maria Santos that Goulding had previously been in the premises and had produced false identification consisting of some other person's drivers licence and that was why she had not asked him for any identification on this occasion.

Counsel for the Licensee advised that he would not be calling any witnesses, but he provided the Tribunal with some information as to the background of the Licensee. Nuno Santos was of Portuguese descent and had been in Canada for approximately 15 years. He was married with three children and was the owner of one other licensed dining lounge known as "The Old York Restaurant" on Niagara Street in Toronto. He had owned these premises for approximately five years. He had never had any problem with that licence and his instructions to his staff were not to serve minors or intoxicated persons. He stated that the strict instructions to all staff were to require proper identification.

In argument, counsel for the Liquor Licence Board referred to section 43 of the Liquor Licence Act which stated "no person shall sell or supply liquor or permit liquor to be sold or supplied to any person in or apparently in an intoxicated condition". He argued that there was sufficient evidence of apparent intoxication and referred to the two certificates of conviction filed with respect to Battisti and Medeiros and the certificate with respect to the conditional discharge given to Romano. Counsel pointed out that the manner of determining the age of the underage patron, Goulding, indicated a laxity on the part of the Licensee and they must have been suspicious since they had previously asked for identification. Goulding was also apparently under age since he had been asked for identification by the police officer. It was pointed out that the licensed premises were very small with a maximum capacity of 28 persons, and yet, approximately 20 per cent of the customers were intoxicated on the evening of February 15, 1985, and on the early morning of February 16, 1985. He stated that the regulations under the Liquor Licence Act should be relatively easy to enforce in such small premises. He pointed out that the penalty had been reduced from the original Notice of Proposal wherein it was proposed to suspend the liquor licence of the Licensee for a period of 14 days.

Counsel for the Applicant argued that the word "intoxication" was a very general term and that a person could be intoxicated for one purpose while not for another purpose. He stated that the effect of alcohol on the behaviour of an individual does not always indicate intoxication. Some people might speak more loudly after consuming alcohol, but are not necessarily intoxicated. Counsel suggested that the penalty of suspension was harsh and excessive. He stated that the Licensee and his wife were making an honest attempt to run a business in not the most savoury area of Toronto, and that there was nothing to indicate that the other patrons were offended, but that people were merely having a good time. He stated that the incidents occurred at very late hours and there was the possibility of fatigue similiar to the fatigue suffered by Terrence Dunn who had the charges against him withdrawn. There were no previous warnings to the Licensee and no evidence that it had previously happened. He confirmed that Mrs. Santos had taken the training seminar given by the Liquor Licence Board. He stated that Mr. Santos was mainly involved in driving a taxicab and that Mrs. Santos was usually in charge of the premises. Counsel argued that a proper definition of "intoxication" would be that of a person beyond self-control and that there was not sufficient evidence to indicate that this was the case.

After reviewing the evidence, the Tribunal finds that the Licensee did sell or supply liquor or permit liquor to be sold or supplied to several persons in or apparently in an intoxicated condition and that the Licensee is in breach of a "term and condition" of his liquor licence. The Tribunal also finds that the Licensee did serve a patron apparently under the age of 19 years with liquor and that as a result the Licensee was also in breach of a "term and condition" of his liquor licence contrary to section 44 of the Liquor Licence Act. The Licensee and his wife should be fully experienced in the operation of their premises since the Licensee has owned and operated the "The Old York Restaurant" with its licensed premises for approximately five years. The Tribunal is of the opinion that the Licensee was lax in the enforcement of the Liquor Licence Act and its Regulation and would point out that the Board had been lenient in reducing the period of suspension from 14 days to seven days. The Tribunal can see no reason why it should interfere with the Decision of the Board.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated June 20th, 1985, and directs the Board to set the date of commencement of the said suspension.

SCARBOROUGH BRIDGE STUDIO  
(SCARBOROUGH BRIDGE & SOCIAL CLUB)

APPEAL FROM THE DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING  
DR. STUART E. ROSENBERG, MEMBER  
NEIL VOSBURGH, MEMBER

APPEARANCES:  
PETER KRAWEC, representing the Applicant  
S.A. GRANNUM, representing the Liquor Licence Board

DATES OF  
HEARING: 10 April and 11 June 1986 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Scarborough Bridge Studio from the Decision of the Liquor Licence Board of Ontario dated the 19th day of November, 1985, whereby the Board revoked the club licence of Scarborough Bridge Studio for the premises known as the "Scarborough Bridge & Social Club" at 515 Milner Avenue, Unit #4, Scarborough, Ontario, effective December 4, 1985.

The Applicant is the Licensee of the premises known as the "Scarborough Bridge & Social Club" and the Liquor Licence Board issued a Notice of Proposal on the 8th day of July, 1985 to revoke the said licence pursuant to Section 10(3) of the Liquor Licence Act because, according to the Proposal, the Licensee is carrying on activities that are contrary to Section 1, clause (d) of Regulation 581 of the Liquor Licence Act in that the licence holder is not a 'club' as defined therein and that the Manager in charge of the premises was convicted of permitting liquor to be removed from the licensed premises contrary to Section 9(13) of the said regulation.

The Applicant requested a formal hearing before the Board pursuant to Section 11(3) of the Liquor Licence Act and a hearing was held on the 19th day of November, 1985. The Board, by its Decision dated the 19th day of November, 1985, revoked the said club licence and the Licensee appealed their Decision to this Tribunal.



The first witness called on behalf of the Board was Irene de Berner who was an Investigator with the Liquor Licence Board. She stated that she had investigated the Scarborough Bridge & Social Club on the 9th day of May, 1985 and her report was filed as part of the record of proceedings before the Liquor Licence Board, which report was dated the 14th day of May, 1985. The witness advised that the signs associated with the premises indicated that it was called the "Milner Club". The witness stated that she entered the premises and approached the bar and ordered a scotch. She was asked to sign a membership book which she did selecting the "guest" column of two columns. She returned to the bar and was served a scotch whisky and paid the sum of \$2.00. The witness then identified herself to the bartender as an Investigator with the Liquor Licence Board and asked to meet the President, Graham Hamilton. She was originally advised that there was no such person, but it appears that he was known as "Bunny" Hamilton. The witness then met with three people who were identified as Robert Fraser, a member, one of the landlords and the Manager of the Club, George Johnston, a member and the bookkeeper, and Donald McConvey, a member and one of the landlords. An examination of the books indicated that there had been no entries since 1982 when five directors resigned and no copies of directors' or members' meetings or by-law revisions since that date. The witness stated that the ease with which she had been able to purchase liquor indicated that the general public could come into the premises and obtain alcohol without any problem.

The witness returned to the premises on May 20, 1985 and at that time met with Mr. Fraser and the President, Mr. Hamilton. It appears that the Club is no longer used for bridge but is used as a sports club and that the condominium unit in which the Club is located is purportedly owned by Fravey Holdings Inc., which is a Company of Mr. Fraser and Mr. R. Provan. The witness confirmed that there was no lease of the premises between the owners of the premises and the Licensee and that Mr. Fraser, as Manager, did not have any written employment contract. The financial records dated back to 1984 only and consisted primarily of two sets of bank statements. A bank account in the name of "Scarborough Bridge & Social Club" was established in the Bank of Montreal and the only signing officers were Mr. Fraser and Mr. Provan, the two landlords, who were not members of the executive of the Club. A further examination of the Club records indicated that various cheques including cheques for public

utilities, mortgage payments and payments to apparent members of the family of Mr. Fraser were all written on the Club account with cheques signed by either Mr. Fraser and Mr. Provan, or by Mr. Fraser alone. The witness was not provided with evidence of any Minutes of meetings of the members of the club approving the financial statements or authorizing the various payments. The President, Mr. Hamilton, indicated that he was not involved in the operation of the Club and that he had turned over the operations of the Club to Fravey Holdings Inc. and Mr. Fraser because they were, to quote him, "there all the time". In the opinion of the witness, the premises were not being operated as a bona fide club and the landlords were operating the said premises as their own business which was open to the public.

The next witness called on behalf of the Board was James Wilson, an Inspector with the Liquor Licence Board, who was responsible for the inspection of the Club for the past three years. He stated that the Club was not a busy place and that he only dealt with Bob Fraser. He never met any of the directors or officers. He stated that he was advised by the Metropolitan Toronto Police that three charges had been laid against Robert Fraser on April 24, 1986, dealing with the serving of liquor after hours, a failure to clear the tables of evidence of liquor and one other charge, and these charges are now pending. He advised that Mr. Fraser is no longer the Manager of the Club. On cross-examination, he stated that he had no knowledge of the police charges or any evidence with respect to same and that he had no knowledge of any reported problems with the Club.

The first witness called by the Applicant was Mr. Robert Fraser, the former Manager of the Club, who stated that he had become associated with the Club in 1980, and that he had purchased the building in 1982. He became involved as Manager of the Club in 1984 and had received no advice as to how to operate the Club. He stated that he only knew Graham Hamilton, the President, as "Bunny" Hamilton, and that he and Mr. Provan were the owners of the building. Counsel for the Applicant introduced as exhibits in this hearing, Exhibit 8, which was a membership list and was apparently prepared approximately one year ago, and Exhibit 9, which was a cash journal containing a statement of income and expenses for the 12 month period ended March 31, 1986. Mr. Fraser stated that all expenses including mortgage payments, payments of taxes, utilities and salaries were all paid through the Club and that he had carried on in the same manner as Mr. Provan had previously. He stated that the Club made donations from



time to time and supported five soccer teams and that if the Club lost its licence, the teams would suffer financially. He stated that with respect to the charges of April 24, 1986, that there had been an international soccer game on television and that after the closing, four of the members had remained to clean up the premises and that he had given them each a beer. There were no other members present. The witness also identified additional draft documents which had been prepared by his counsel, including a draft certificate of encumbrancy, a draft application for incorporation of the "Milner Club" as a non-share capital corporation, a draft lease for the premises and draft supporting affidavits, none of which documents were executed.

On cross-examination, the witness confirmed that the membership list had been prepared by Mr. Johnston, the new President of the Club, approximately one year ago and he also confirmed that he had no Minutes of members' meetings. He stated that the financial statements referred to the "Milner Club" and that during his involvement, the property had not been known as the "Scarborough Bridge & Social Club". He advised that the Club had no letterhead. He stated that in January, he had made a request to the Liquor Licence Board to change the name of the club from the "Scarborough Bridge & Social Club" to the "Milner Club" which was done by a simple letter with a cheque for \$50.00 attached. This cheque, together with another cheque issued for the same purpose, had both been returned. The witness confirmed that there had been no meetings of the members approving the payments of the various expenses and cheques and that the regular members merely drop in for a beer, and that they would have an informal meeting. When questioned by the Tribunal about the statement of income and expenses for the 12 month period ended March 31, 1986, the witness confirmed income of \$302,667.00 during that period with total costs of sales, including wages of \$49,249.00, administration expenses of \$20,818.00 and this left, as described in the statement, net profit and cash to bank of \$154,729.00. He stated that during this period, the total donations to soccer clubs would be approximately \$2,300.00, although the item in administration expenses for donations and gifts amounted to only \$375.00. He stated that the members were charged an annual fee of \$10.00, which amount was merely deposited in the till. He confirmed that the premises contained an area of approximately 2,400 square feet and that when he purchased the building, he also arranged to purchase certain tenants'

fixtures, including shelves from what had been the "Scarborough Bridge Club". He stated that the original "Scarborough Bridge Club" had ceased operations in 1982.

The next witness called by the Applicant was Angus MacKenzie who had been a member of the "Milner Club" for the past six years and was a Vice-President. He stated that he had now been offered the job as Manager to replace Mr. Fraser. He stated that arrangements were being made to print membership cards, a monthly newsletter and that signs had been erected at the bar prohibiting minors and that guests must be signed in by a member. He stated that there had been an Annual Meeting held to reorganize the club and to appoint a new executive and that there were only 87 people present at the meeting. He stated that the Club supported various projects, including a run for muscular dystrophy and that they would invite boys on the soccer teams, which were sponsored by the Club, back to the Club for pop.

On cross-examination, the witness advised that he did not think that meetings of the executive had been necessary, but that he had been to at least three or four Annual Meetings during the six years that he had been a member. He confirmed that Mr. Fraser and Mr. Provan had been approved as the signing officers, but that they were not executives and only members, and he admitted that this was highly irregular. He confirmed that he had never been shown financial statements as a member of the Club and had no knowledge as to the disposition of the funds. He also stated that the Club had never reviewed the expenses of the Club and that any donations which were given were the decision of the Manager, Mr. Fraser.

Counsel for the Liquor Licence Board argued that the licence had been issued in the name of the "Scarborough Bridge & Social Club" which was apparently a share capital corporation and that none of the executive of the previous operation had anything to do with the Club and that everything had been delegated to Mr. Fraser and Mr. Provan. Counsel argued that the Club was being operated by Mr. Fraser and Mr. Provan as a profit making business for themselves and that this was borne out by the statement of income and expenses filed as an exhibit. He pointed out the fact that there were no Minutes of Meetings, no records of dues, no records of donations and he stated that the club was not a 'club' within the definition of Section 1(d)(3) of Regulation 581 of the Liquor Licence Act and that the Licensee was not

complying with Section 26 of the regulation. He submitted that the Liquor Licence Board was correct in revoking the said licence.

Counsel for the Applicant stated that it was very difficult to obtain information which was compounded by the fact that the members thought that they were a club and that they only needed to pay the sum of \$50.00 to change the name of the Licensee. He stated that the members had now shown an intent to deal properly with the Club and had attempted to comply with the deficiencies. He referred to the fact that there were defects in the financial statements and that they were incomplete, but that if the licence was revoked, there would be a hardship on the community in that there would be a loss of sponsorship of soccer clubs. Counsel acknowledged that the documents submitted as exhibits with respect to a new application for a charter for the "Milner Club" and lease and other supporting documents were draft documents only. The draft lease referred to the premises as being used for a dental office with an area of 673 square feet and he stated, that this had been prepared in error.

The Tribunal finds that the Applicant is carrying on activities contrary to the Liquor Licence Act and its regulations, and that the licence holder is not a 'club' as defined therein. It is difficult to understand how the original club licence would have been issued to a share capital corporation as this, in itself, would be contrary to the requirements of the regulations. The evidence would confirm that Mr. Fraser and Mr. Provan, the landlords, were operating the Club and that the net profit of the Club operations for the 23 months ending March 31, 1986, amounted to \$154,729.00. Admittedly, mortgage payments and taxes and other expenses would have been surplus and it would appear that Mr. Fraser and Mr. Provan have retained all remaining monies as their own. The financial statement shows total gross sales of \$302,667.00 and yet donations and gifts amounted to only \$375.00. The Tribunal is disturbed that this type of operation could exist undetected for a period of approximately three years. The original investigation by the Liquor Licence Board was commenced in May of 1985, and no real attempt had been made since that time to operate the Club as a proper club within the definition of the regulations of the Liquor Licence Act. The method of operation of the bank account, the lack of proper meetings, the failure of the executive of the club to have any say in the operation of the club and the complete lack of accountability with respect to any surplus and profits are

all additional evidence to confirm the Tribunal's findings that this is not a proper club operation. There is also before the Tribunal the uncontradicted evidence of the Investigator of the Liquor Licence Board who was able to walk into the premises as a member of the public, unknown to any members and not introduced by a member, and purchase liquor. There is also the evidence before the Tribunal of the conviction by Mr. Fraser as Manager in charge of the premises of permitting liquor to be removed from the licensed premises.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 19th day of November, 1985, revoking the licence and authorizes the Board to revoke the said licence forthwith.

VILLAGE GATE THEATRICAL PRODUCTIONS INC.  
(THE DIAMOND RESTAURANT)

APPEAL FROM THE DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE  
DINING LOUNGE LICENCE

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
KENNETH VAN HAMME, MEMBER  
RONALD W. CHEMIJ, MEMBER

APPEARANCES:

GERALD A. LEVITAN, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF  
HEARING: 21 July 1986 Toronto

# REASONS FOR DECISION AND ORDER

The Applicant, Village Gate Theatrical Productions Inc., appeals the Decision of the Liquor Licence Board of Ontario dated October 22nd, 1985, wherein the Board attached a term and condition to the Dining Lounge Licence held by the Applicant. The term and condition was that the sale and service of alcoholic beverages shall cease at 10.00 p.m. daily, until there has been compliance and the Licence Holder makes application to the Board for removal of same pursuant to Section 9(2) of the Act.

The "compliance" was compliance with Section 9(6) of Regulation 581 made under the Liquor Licence Act. This subsection requires that total receipts from the sale of food in any month shall be not less than 40 per cent of the total receipts from the sale of liquor and food in that month. There is no dispute that this food/liquor ratio has not been met since the business was acquired by the present principals in 1984.

The licensed premises consist of three areas: the southwest centre section which has a dance floor and stage; the east side section and the south centre balcony which overlooks the dance floor. The total capacity is 686 persons. The Applicant holds a Dining Lounge Licence which



was initially obtained in 1983 for a dinner/theatre type of operation. Sometime later, noting that there were few night clubs in Toronto, the Applicant promoted a nightclub/dance club atmosphere with live entertainment and dancing emphasized.

The two Inspectors with the Liquor Licence Board who gave evidence found the premises well run with apparently no contraventions of the Liquor Licence Act save and except for the failure to meet the food/liquor ratio. Mr. Lownds, one of the Inspectors who visited the premises in early July, 1986, said that the east side section had recently been refurbished to make it more suitable for use as a proper dining room and that the kitchen facilities were adequate to provide full food service for this section. At the time of this hearing, this dining room opened at 8:00 p.m.

Exhibit 12A contains the liquor/food reports for the period October 1984 to April 1986 inclusive. During this period, the highest percentage of food sales was in December, 1985, when it reached 29% of all sales in that month. Exhibit 12B provides ratios for the months of May and June 1986. The percentage of food sales during these months was 22% and 25% respectively. Although food sales have improved since April 1985, the percentage of food sales has hovered around 20% since the beginning of 1986.

Several witnesses, including Patrick Kenny who is President of the Corporation, gave evidence as to the steps taken by the Applicant to increase food sales. The latest of these efforts was to turn one of the rooms into a "first class upscale dining room" and to provide banquet and catering facilities. Mr. Kenny said some \$30,000 had been spent to make this transformation. The 'new' dining room called the Blue Flamingo had just opened on July 15, 1986, and it had not yet been fully promoted or marketed to the public. The Tribunal was assured that if the new room caught on with the public, then the required food/liquor ratio would be met.

A number of individuals engaged in promoting and showcasing new Canadian musicians and artists, and one reporter, all spoke highly of the Diamond (the name of the premises) as a place to show new Canadian acts. The word 'unique' was often applied in describing the atmosphere and premises. All agreed that if the premises were closed, the effect on young Canadian musicians and comics would be negative. The Applicant also filed a lengthy petition and numerous letters praising the Diamond and urging that it be allowed to operate.



Two witnesses living in the immediate vicinity were called, one by the Applicant and one by the landlord. Miss Mair, living next door to the club, testified that she could not hear the music or any noise from it and that she had no problems with patrons. Mr. Hamilton, living somewhat further away, said he was at times disturbed and felt intimidated by the noise and actions of patrons leaving the club late at night. However, he admitted that he had never called the police to register complaints.

In his submissions to the Tribunal, Mr. Grannum on behalf of the Board pointed out that the food/liquor ratio of not less than 40/60 was mandatory and that the ratio had never been met since the club concept had been adopted. He noted that there had been no attempt to open the dining facilities at an earlier hour such as 5:00 p.m. which may have helped to increase the food sales. He argued that the Applicant has had some two years to comply with the Liquor Licence Act and that was more than reasonable time. Given these facts, he said he could see no reason to disturb the Order of the Liquor Licence Board, particularly as there was no evidence as to a better solution to achieve the required ratio.

Mr. Levitan, on behalf of the Applicant, suggested that this was not a 'standard liquor/food problem' because the Diamond was a unique establishment being a restaurant, dance hall and a place to hear live acts - all in one. He pointed out that on the evidence before the Tribunal, the operation was well run. He said that the evidence also showed a valid, although at times unsuccessful, effort on the part of the Applicant to comply with the Act and regulations. He argued that greater emphasis should be given to the actions taken by the principals in the last three months to comply. He warned the Tribunal that if the club closed, the jobs of some 65 - 70 club employees would be in jeopardy, as would those of thousands of musicians and local artists. He noted the Government's publicly stated intention to review the Liquor Licence Act in general and the food/liquor ratio in particular, in light of today's attitudes. He urged the Tribunal to keep all these matters in mind, and in exercising its discretion, to make an enlightened decision. He noted that the present licence expires on December 15th, 1986, and said that there would be no prejudice to allow the licence to take its course and give the establishment the time to show that it could comply with the Act.

The ultimate penalty for breaching the Liquor Licence Act is total suspension of the licence. There is, however, a discretion to impose a lesser penalty by attaching terms and conditions to the licence until such time as full compliance with the Act is attained.

The Applicant has asked this Tribunal to make an enlightened decision, by which it means, to do nothing which would interfere with the way the Applicant is carrying on business. The Tribunal is asked to do this for a number of reasons, but especially because the Act is under review and may be changed so that what is now non-compliance may be allowed in the future.

The Tribunal cannot base its decision on what people would like the law to be or what it expects the law to be in the future. The decision must be based on what the law is now. If those affected by such law are dissatisfied with the result of the present legislation, their remedy is to go and knock at the doors of those who enacted it, not at the doors of this Tribunal.

Mr. Kenny admitted that he knew that he had a Dining Lounge Licence when he decided to change the nature of the business from a dinner/theatre operation to what is in essence a disco night club. It should have been apparent to him and his managers, from the very beginning, that the type of business he was operating was not conducive to the consumption of food, although it was very conducive to the consumption of liquor. Nevertheless, in a period of two years, he did little to remedy the situation. Even after the Liquor Licence Board issued its Proposal on June 21st, 1985, well over a year ago, the Applicant has not taken adequate steps to increase food sales to the legally required minimum. The Applicant now comes to this Tribunal saying it is a brand new, untried approach to solve the problem and asking for additional time - at least to the end of the year. It is interesting to note that the submission (Exhibit A) which was filed by the Secretary of the Applicant and her solicitor, dated January, 1986, suggested that another six months would be sufficient in which to achieve compliance with the Act. There is still no compliance - far from it in fact.

The Tribunal accepts the evidence that this business is well run, that it provides a special, if not unique forum for new talent and that it is a good corporate citizen in the community. No doubt the Liquor Licence Board, if it had the

same evidence before it, would have reached the same conclusions on these matters. However, the fact is that in one particular aspect of its business operation, the Applicant is breaking the law. This Tribunal cannot gloss over or ignore this fact. The Applicant could have achieved the mandatory ratio by significantly changing its business direction. It declined to do so and has instead made what could be described as cosmetic changes in the overall operation. These changes have not produced the desired result of increasing food sales to 40 percent of total food and liquor sales. Whether the latest change will have the hoped for effect remains to be seen. We sincerely hope it does.

The solution put forward by Mr. Levitan is not acceptable given the already very long period of non-compliance. To allow matters to continue as they are would be very discriminatory in favour of the Applicant vis a vis all other businesses licensed under the Liquor Licence Act which fit their business to the licence and do comply with the Act and regulations. Taking all matters into account and mindful of the possible negative effect its decision may have on the Applicant's employees and others, the Tribunal finds that the term and condition attached to the Dining Lounge Licence of the Applicant by the Liquor Licence Board is reasonable under the circumstances.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 22nd day of October, 1985 and directs the Board to set the date of commencement of the said "Term and Condition".

## WEST TORONTO INTER-CHURCH TEMPERANCE FEDERATION

APPEAL FROM A DECISION OF THE LIQUOR LICENCE BOARD

TO APPROVE THE ISSUANCE OF A CLUB DINING LOUNGE  
LICENCERE:  
MALTA BAND CLUBTRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
DENNIS J. EGAN, MEMBER

## APPEARANCES:

W.H. TEMPLE, (Secretary to the Federation),  
representing the ApplicantGEORGE MALLIA, (President), representing the  
Malta Band Club

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 2 December 1985

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by the West Toronto Inter-Church Temperance Federation (the "Federation") from the Decision of the Liquor Licence Board of Ontario (the "Board") dated July 25, 1985, following a hearing wherein the Board granted approval to the issuance of a club dining lounge licence to the Malta Band Incorporated (the "Club") for its premises situated at 235 Medland Street, Toronto.

Under the Terms and Conditions contained in section 26(2) of the regulations to the Liquor Licence Act, a holder of such licence shall not sell liquor except to a member of the club, spouse of a member or registered guest of a member or such person as may be specified in the by-laws or constitution of the club as having access to the privileges of the club by reason of a reciprocal agreement with another club.

The Federation, an unincorporated volunteer organization, was represented at the hearing by its President Derwyn A. Foley and its secretary, William H. Temple. The basis of the appeal of the Federation is contained in its letter dated November 22, 1985, filed as Exhibit 10. The second and third paragraphs of the letter read as follows:

In 1909 the City of Toronto was expanding westward, and approaching the City of West Toronto, and asked them [sic] to unite with the City of Toronto. This was agreed to providing the City of Toronto would respect their dry by-law. Toronto agreed to this and signed a statement which said that no liquor selling establishments could be opened until the agreement had first been voted out by a majority of the people. This of course referred to clubs private or otherwise.

The granting of this Licence right in the centre of the dry [sic] would be in direct defiance of the will of the people as expressed in three liquor plebiscites held in 1966, 1972 and 1984. In all three votes the turn-out was bigger than in municipal elections and with more than 60% opposed to liquor selling establishments.

On the other hand, the Club submits that the prohibition contained in the Liquor Licence Act against the sale of liquor in a prohibited area does not apply to private clubs by virtue of Section 63(2) of Ontario Regulation 581 if the club is not otherwise disentitled to a licence. Mr. Grannum, counsel on behalf of the Liquor Licence Board supported this position.

On the basis of the undisputed evidence provided to it, the Tribunal finds that:

- the Club is a club within the meaning of the Liquor Licence Act;
- the Club premises are situate in a "dry area";
- the premises meet the health and safety standards of the Province of Ontario;
- although incorporated in 1977 as a non-profit organization without share capital, the Club has been in operation since 1971;



- the Club has occupied the premises at 235 Medland Street, Toronto since 1976;
- special occasion permits have been issued to the Club in the past;
- there are two other private member clubs in close proximity to the Club premises both of which have a Club dining lounge licence.

No one, other than the Federation, opposed the Club's application for a club dining lounge licence even though a public notice relating to the application was posted on the door of the Club's premises and a public notice was published in the Toronto Star on April 18 and April 25, 1985, and a second chance for input was provided by a subsequent notice relating to this appeal, published by the Tribunal, again in the Toronto Star, on November 18th, 1985.

There was some disagreement about the characterization of the immediate neighbourhood and the proximity of the nearest residents to the Club's premises. Evidence given by the secretary of the Club, Mr. Sam Borg and by its President, Mr. George Mallia, shows that although the entrance to the Club premises is off Medland Avenue some twenty feet south of Dundas Street, the property is actually situated on the corner of Dundas Street West and Medland. The main or first floor of the property is occupied by retail stores entered off Dundas Street. On the corner opposite the Club's premises, is a funeral home. Mr. Mallia stated that the property had been chosen with care because it was the intention of the Club from its inception to stress the band activity and to teach the playing of band instruments. It was therefore important to the Club to have no immediate adjoining neighbours who could be disturbed by the sound of band music. The premises chosen met this need. Mr. Borg and Mr. Mallia also testified that the first residential property was some 120 to 150 feet south of Dundas Street on Medland Avenue. The Liquor Licence Board Inspector, called by Mr. Grannum, classified the area as mainly commercial. The Tribunal agrees with the Inspector, that the immediate area is not what is generally regarded as a residential area.

The Tribunal was impressed by the integrity and sincerity of the members of both the Federation and the Club.

Under the scheme of the Liquor Licence Act, an applicant for a liquor licence is entitled to such licence except where certain circumstances exist. Section 25 of the Act provides that subject to the provisions of sections 26



and 27 no licence shall be issued in a municipality where the sale of liquor was prohibited under the law as it existed immediately before February 4, 1976 or if not prohibited by the law, where no licence has been issued since September 16, 1916. The area in which the Club premises are situate is a prohibited area as provided in section 25.

However, the matter does not stop here. Section 63(2) of Ontario Regulation 581 under the Act states: "Clubs that have been in active operation for a period of not less than three years are exempted from the provisions of sections 25, 26 and 27 of the Act."

It was argued by Mr. Foley and Mr. Temple that the agreement referred to in the Federation's letter takes precedence over any statutory enactment made subsequent thereto and therefore, the Regulation has no effect. This Tribunal does not have the agreement before it and so has no way of knowing what the specific provisions were, or if indeed there was an agreement. Mr. Grannum made reference to By-law 551 which was the local option by-law of the former City of West Toronto but did not go into details.

The Ontario Court of Appeal in Croatian Estates Ltd. v. City of Toronto found that that by-law had been effectively repealed by the enactment of the Ontario Temperance Act in 1916.

The Tribunal finds that even if there was an agreement, as alleged, provincial legislation validly enacted overrides any municipal agreement or municipal by-law in conflict with that legislation.

The Legislature and the Lieutenant Governor-in-Council by the wording of their respective enactments have shown their collective intention to give clubs as defined in the Regulation special status under the Liquor Licence Act. On the one hand, clubs are exempt from certain of the provisions of the Act but on the other hand, they are only entitled to a liquor licence with limited application.

Section 10 of the Interpretation Act requires that "every Act...shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

It is the opinion of the Tribunal that the prohibitions contained in sections 25, 26 and 27 of the Act have no application to a club situate in any dry area and that, unless otherwise disentitled, a liquor licence should issue to the Malta Band Club. In addition to the provisions contained in section 25 of the Act, section 6 sets out the exceptions to the entitlement. There was no suggestion that the Club was not entitled to a liquor licence by virtue of the provisions of clauses a to f inclusive of subsection 1 of section 6. Clause of the said subsection states that "in the case of an application for a licence, the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is situated." As noted above, no member of the public other than the Federation opposed the application by the Club. The application for the club dining lounge liquor licence was fully supported by the Club members. The Tribunal is satisfied that, even the limited nature of the licence applied for, the Club ought not to be disentitled to such licence by virtue of this clause.

The Tribunal having considered the evidence and the submissions made to it and by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, hereby confirms the Decision of the Liquor Licence Board dated July 14th, 1985, which approved the issuance of a club dining lounge licence to the Malta Band Club.

FREDERICK A. BULLOCK

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN  
TO REFUSE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
DR. STEPHEN G. TRIANTIS, MEMBER  
RALPH C. PHILLIPS, MEMBER

APPEARANCES:

WAYNE R. WATTERWORTH, representing the Applicant

A.N. MAJAINA, representing the Registrar of  
Motor Vehicle Dealers and Salesmen

DATE OF

HEARING: 22 July 1986

Toronto

#### REASONS FOR DECISION AND ORDER

Frederick A. Bullock seeks to be registered as a salesman under the Motor Vehicle Dealers Act. In verifying Mr. Bullock's application, the Registrar under this Act found that Mr. Bullock had been less than totally candid in answering a number of questions on the application.

Mr. Bullock had previously been registered as a funeral director under the Funeral Services Act. In April, 1985, the Discipline Committee established under that Act found Mr. Bullock guilty of professional misconduct because he had converted to his own use monies paid in trust to him under the Prearranged Funeral Services Act. The Discipline Committee revoked his licence as a funeral director.

Earlier in the same month, Mr. Bullock had been convicted of 78 counts of theft contrary to Section 294(a) of the Criminal Code. The total amount involved in these thefts was some \$119,900.

Because of this past criminal record and because Mr. Bullock failed to disclose fully the magnitude of his professional misconduct, the Registrar proposed to refuse to grant registration. It is from this Proposal that Mr. Bullock now appeals.

Frederick Bullock is 49 years old, married, with three adult children no longer living at home. He has a grade 12 education. According to the evidence, in 1963 Mr. Bullock began working for his father in the latter's funeral service business. In 1976, he purchased the business from his father and continued to operate it until his licence was revoked in April 1985.

It appears from the Certificate of conviction, which was filed as Exhibit 6 in these proceedings, that as soon as Mr. Bullock acquired the business, he began converting the monies paid to him in trust under the Prearranged Funeral Services Act. These monies had been placed in a general trust account and through the whole period - 1976 to 1985, Mr. Bullock persistently continued to take and use these trust funds to pay for operating expenses and for his own use. Because the temptation to use these monies was so great, Mr. Bullock, in early 1985, began setting up individual trust accounts in the names of persons who had prepaid for funeral services. However, notwithstanding his good intentions, he continued to convert trust funds in the general trust account to his own use.

Mr. Bullock told the Tribunal that he knew what he was doing was very wrong but that he intended to provide funeral services to those who had prepaid even if the funds were no longer in the account.

It is to be noted that during this same period, 1976 - 1985, it appears that Mr. Bullock knowingly provided false information concerning prearranged funerals on the annual application for renewal of his licence contrary to the Funeral Services Act.

The conversions were uncovered during a spot check made by an Inspector appointed under the Funeral Services Act. The police were advised and subsequently, the 78 charges under the Criminal Code were laid. Mr. Bullock pleaded guilty to all charges. The original convictions carried a sentence of 60 days imprisonment on each count to be served intermittently and concurrently. A compensation order under Section 653 of the Criminal Code was made and Mr. Bullock was placed on probation for 30 months.

The Crown appealed the sentence. The Court of Appeal increased the custodial sentence from 60 days intermittent to one year for each count concurrent. The probation order was deleted but the compensation order was confirmed.

In reaching its decision, the Court stated in part as follows:

We are all of the view that having regard to the serious breach of trust committed by the respondent over a long period of time and the amount involved the sentence is wholly inadequate to reflect the gravity of the offence and does not give adequate weight to the factor of general deterrence.

Giving this matter our best consideration we have come to the conclusion that a sentence of 12 months would be an appropriate sentence taking into account the mitigating factors and that the respondent has endeavoured to compensate the victims in the manner provided in the agreement of sale. We also recognize that re-incarcerating a person after he has served the term of imprisonment imposed by the trial judge imposes an additional hardship upon him. Were it not for these facts, we would have felt constrained to impose a somewhat longer sentence than the sentence of 12 months.

The pre-sentence report on Mr. Bullock states that

With the exception of these present charges, Fred Bullock appears to be a model citizen. He is involved in his community, he is a good family man, and churchgoer. It appears that criminal doings of any kind would be out of character for this individual.

Mr. Bullock sold his business in March 1985. As part of the agreement, the purchasers agreed to credit those persons, who had prepaid funeral services arranged with Mr. Bullock, up to \$1,500.00 for future services. This is the compensation to victims referred to by the Court of Appeal.

Mr. Bullock is now employed by Silverthorne Dodge Chrysler Inc. Mr. Silverthorne, the President of this dealership, was aware of Mr. Bullock's convictions when he hired him in 1985. He spoke very highly of Mr. Bullock, considering him to be one of his better employees. Mr. Silverthorne supported Mr. Bullock's application to be registered under the Motor Vehicle Dealers Act. He believed there would be no risk to the public if registration was granted because of the way his dealership handles the sales paperwork.

In the Brenner decision, the Divisional Court said:

The effect of s.7(4) [of the Motor Vehicle Dealers Act] is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

The Tribunal believes that when assessing the probable future actions of individuals, some reliance may be placed on the past acts of the individual to be assessed.

In reviewing all of the evidence presented to it, the Tribunal notes that the thefts were committed over a long period of time - almost a decade. They were committed by a mature individual who evidently had the confidence and respect of the community. He abused this confidence in a shameful manner. The fact that he co-operated with the police after he was found out does not show honesty or integrity. By his own admission, he was tempted by the easy access he had to the general trust account and even though he knew that what he was doing was wrong, he could not resist that temptation. While Mr. Silverthorne may operate in such a manner to keep temptation out of reach, other dealers may not and there is nothing to prevent Mr. Bullock from changing employers. Although Mr. Bullock maintained that he did not intend to mislead the Registrar of Motor Vehicle Dealers, he did not fully disclose all the facts surrounding his convictions and loss of licence. He had certainly deliberately misled the Registrar under the Funeral Services Act.



The most recent theft appears to have taken place in February, 1985, and although Mr. Bullock has served his sentence, in the Tribunal's opinion, not enough time has elapsed to show that he has indeed reformed. Although Mr. Bullock stated his intention to pay back the monies he stole, to date he has done little in this regard. It was pointed out that if he could earn a better salary, he could carry out his intentions much quicker. That may be so, but that cannot be the basis for granting registration. The public interest in general must be paramount.

Given the evidence before it, the Tribunal is of the opinion that the Registrar was not in error in his conclusion. The refusal to register Mr. Bullock as a salesman under the Motor Vehicle Dealers Act will not deprive him of his livelihood. He was and is able to hold any position with Mr. Silverthorne, other than as a registered salesman. Mr. Bullock is also free to go into sales and marketing, if that is his bent, in any other business that is not regulated by this Province.

Mr. Bullock's conduct to date does not satisfy this Tribunal that in future, he will be financially responsible and that his conduct will be lawful. In time, this evidence may be available. The Tribunal directs Mr. Bullock to Section 8 of the Motor Vehicle Dealers Act which reads:

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

For the present, the Tribunal holds that the Registrar's Proposal must be upheld. Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

SCOTT BURRILL

APPEAL FROM A PROPOSAL OF  
THE REGISTRAR OF MOTOR VEHICLE DEALERS & SALESMEN  
TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
MARY G. CRITELLI, VICE-CHAIRMAN AS MEMBER  
J.T. HOGAN, MEMBER

APPEARANCES:

STEPHEN A. AUSTIN, representing the Registrar  
of Motor Vehicle Dealers and Salesmen

No one appearing for the Applicant

DATE OF HEARING: 20 May 1986 Toronto

#### REASONS FOR DECISION AND ORDER

This is an appeal by Scott Burrill from the Proposal of the Registrar of Motor Vehicle Dealers and Salesmen dated July 29th, 1985, wherein the Registrar proposed to revoke the applicant's registration under the Motor Vehicle Dealers Act. The reasons given by the Registrar for the Proposal were that in the Registrar's opinion Burrill's registration should be revoked as his past conduct afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The applicant did not appear at the hearing. However, the Tribunal is satisfied that he was properly served with the Notice of Hearing.

Four witnesses were called in addition to the Registrar to give evidence as to the circumstances leading up to the Registrar's Proposal. The allegations contained in the Proposal with reference to Scott Burrill have been proved to the satisfaction of the Tribunal.

The Tribunal finds that Scott Burrill was involved in a series of transactions in which he, by deceit, misrepresented the odometer readings on several motor vehicles. This finding is based, firstly, on the documents contained in Exhibit 8, and confirmed by the testimony of three buyers of cars from the dealership where Mr. Burrill

worked. In addition, Scott Burrill pleaded guilty to three criminal charges. Included in the documents are three Certificates of Conviction under the Criminal Code and the fines levied against Scott Burrill.

Under the circumstances, the Tribunal finds that the Registrar did have reasonable grounds for belief that Mr. Burrill would not carry on business in accordance with law and with integrity and honesty.

Accordingly by virtue of the authority vested in it under in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

CENTENNIAL PLYMOUTH CHRYSLER (1973) LTD.  
and D. BROWN MOTORS (BARRIE) LIMITED  
and GORDON D. COATES

APPEAL FROM A PROPOSAL OF  
THE REGISTRAR OF MOTOR VEHICLE DEALERS & SALESMEN  
TO REVOKE THE REGISTRATIONS

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN, PRESIDING  
F. THOMAS PEOTTO, MEMBER  
KEITH COULTER, MEMBER

APPEARANCES:

ROBERT J. CARTER, Q.C., representing the Applicants

S.P. MARTIN, representing the Registrar of  
Motor Vehicle Dealers and Salesman

DATES OF 3, 4, December 1985  
HEARING: 13 March 1986

Barrie  
Toronto

#### REASONS FOR DECISION AND ORDER

The Applicants' appeal from the Proposal of the Registrar of Motor Vehicle Dealers and Salesmen to revoke their respective registrations; dealers' registrations in the case of the corporations and that of a salesman in the case of Gordon D. Coates. The Registrar's Reasons underlying this Proposal were stated in part as follows:

- A) In my opinion, the Company's [Centennial Plymouth Chrysler (1973) Ltd.] registration should be revoked as:
  - i) the past conduct of the Company affords reasonable grounds for belief that it will not carry on business in accordance with law and with integrity and honesty; or
  - ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

- iii) the Company has carried on activities that are in contravention of the Act or the regulations.
- B) In my opinion, Coates' registration should be revoked as:
  - i) the past conduct of Coates affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or
  - ii) Coates has carried on activities that are, or will be, if he is registered, in contravention of the Act or the regulations.

. . . . .

# PARTICULARS

IT IS ALLEGED AS FOLLOWS:

1. That Centennial Plymouth Chrysler (1973) Ltd. (the "Company") is a corporation registered under the Act to carry on business as a motor vehicle dealer.
2. That Gordon D. Coates ("Coates") was at all material times, and is the President, Director and sole Shareholder of the Company. Coates was at all material times in control of the Company and was actively involved in all of its operations.
3. On or about the 24th day of November, 1982, the Company was convicted of an offence under Section 33(1) of the Act in that they did, upon the sale of used motor vehicles fail to show the recorded odometer readings on the sales orders contrary to Section 16(2)(o) of Ontario Regulations 98/71 made under the Motor Vehicle Dealers Act. Upon conviction the Company was fined \$403.00.

4. On or about the 24th day of November, 1982 Acadia Rent A Car Ltd. and Klean Auto Leasing, two other companies controlled by Gordon D. Coates were each convicted of that same offence under the Act. Klean Auto Leasing was fined \$303.00 on conviction and Acadia Rent A Car Ltd. was fined \$403.00 on conviction.
5. On or about the 9th day of September, 1985 the Company pleaded guilty and was convicted of 13 counts of odometer tampering under Section 27(1) of the Weights and Measures Act, and 2 counts of fraud under Section 338(1) of the Criminal Code of Canada. The Company was fined \$3,000.00 on each count for a total of \$45,000.00 in fines.

[Note: These convictions were entered in the District Court of Ontario following the trial before the Honourable Judge A.P. Dilks]

6. That the aforementioned convictions related to the alteration of odometers on motor vehicles.
7. That at all material times Coates was the sole shareholder, a Director and President of the Company and was actively involved in the operation of the Company and in control of its operations.
8. That D. Brown Motors (Barrie) Limited ("Brown Limited") is a corporation registered under the Act to carry on business as a motor vehicle dealer at 437 Dunlop Street West in the City of Barrie.
9. That Coates owns approximately two-thirds of the shares of Brown Limited and is a Director and officer of that corporation. Coates is active in the operation of that corporation.



The Registrar's Proposal recites that section 6 of the Act provides that:

...subject to Section 7, the Registrar may revoke a registration for any reason that would disentitle a registrant to registration under section 5 if he were an applicant, or where the registrant is in breach of a term or condition of the registration;

Section 5 provides:

- (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
  - (a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
  - (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or
  - (c) the applicant is a corporation and
    - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
    - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
  - (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

The evidence presented at this hearing has completely satisfied the Tribunal that the convictions referred to above were justly and properly entered against Centennial Plymouth Chrysler (1973) Ltd. and that the wrongdoing in question was sufficient in nature and quality to justify the Registrar's Proposal in respect to that Applicant or any other applicant guilty or responsible for such wrongdoing.

Upon the evidence, the Tribunal is also satisfied that the allegation set out in the Registrar's Proposal to the effect that Gordon Coates "was at all material times, and is the President, Director and sole Shareholder of the Company" is also accurate and correct.

In the course of final submissions counsel for the Applicants put forward the argument that the aforesaid convictions of the corporate entity Centennial Plymouth Chrysler (1973) Ltd. did not affect its entitlement to registration upon a precise interpretation of section 5 of the Act. He argued that subsections 5(1)(a) and (b) referred not to corporate applicants but only to applicants who were persons. Corporate applicants were referred to in subsection 5(1)(c). That is to say, subsections 5(1)(a) and (b) refer exclusively to personal applicants; subsection 5(1)(c) exclusively to corporate applicants. Therefore, since subsections 5(1)(a) and (b) could not operate in respect to a corporation, the convictions registered against Centennial Plymouth Chrysler (1973) Ltd. had no relevance and could not affect that Corporation's entitlement to registration under the Act. Only if the past conduct of its officers or directors afforded reasonable grounds for belief that its business would not be carried on in accordance with law and with integrity and honesty could it be disentitled under the subsection which dealt with corporations, namely, subsection 5(1)(c). But Mr. Coates, who at all material times was and is the President, Director and sole shareholder of the Company, was not convicted of the consumer related charges to which the corporate applicant, his Company, pleaded guilty and was convicted.

The Crown withdrew its charges against Mr. Coates at or about the same time as his Company entered the guilty pleas and, therefore, the Judge had no option or opportunity to convict him. Similarly, the third Applicant was unaffected, so ran the argument.

The Tribunal has pondered these ingenious notions at length and not without a degree of relish for their subtlety. But in the end, it rejects them.

It has long been a generous and on the whole very sensible presumption of the common law that a child born to a married woman is the offspring of the lady's husband. But it is a rebuttable presumption. In wartime, where the husband had been for a year or more on service on the opposite side of the globe, perhaps in prison in a Japanese P.O.W. Camp, the arrival of an heir might have aroused in certain minds the suspicion of extraneous intervention. But the presumption of legitimacy would still persist unless formally rebutted.

Odometer spinning, like other dangerous practices, is rarely done in the presence of onlookers, but, to the contrary, we understand it is done behind closed curtains. However, when it is discovered and proven, we may take judicial notice that somebody or other is responsible; not just a corporate entity but an actual person because a corporate entity, for all its extraordinary powers, cannot physically spin an odometer anymore than it can get into a number of other kinds of trouble.

When a Corporation pleads guilty to that offence the matter does not end there so far as this Tribunal is concerned. We are willing, ready and able to presume that in the case of a closely-held and controlled corporation, something which has been proven in our view of this case to have been nothing less than an alter ego of Mr. Coates, a guilty plea of the fraud and crime of odometer tampering is prima facie evidence that the authorship of that wrongdoing was that of the person or persons in control of that Corporation. We welcome the opportunity to establish this principal if it has not been put on record before, and if we are wrong, we would be glad of the opportunity of having the error corrected.

One can easily think of cases where a corporation, especially a large corporation with many shareholders, could be convicted of serious consumer or criminal offences without there having been any knowledge or guilt of wrongdoing by the shareholders or even some or all of the directors. But in a case such as this, where very close control and beneficial ownership were entirely vested in one man, we would have to see evidence that that person, the person in charge was not involved in the established wrong-doing and in this case no such evidence was offered. We are not making a presumption of "guilty until proven innocent". But we are making a presumption that the person in charge was also informed, aware of and/or responsible for what was going on.

The standard of proof required before this Tribunal can reach a decision is not that of criminal law but is that arising from the Tribunal's jurisdiction which in turn is to be determined from the Act under which this Proposal was brought, as well, inter alia, as the Ministry of Consumer and Commercial Relations Act, the Statutory Powers Procedure Act and as we are assured, section 10 of the Interpretation Act. The legislation under which it is proposed to revoke the Applicants' registrations is consumer legislation designed to protect the public. It is not meant to punish but to protect. To that end, the Tribunal has no hesitation in stripping all three of these registrants of their respective registrations and thereby of their ability to do further harm to innocent individuals who venture into the market place.

At this point we are moved to quote and include in our Reasons the language of His Honour Judge Dilks in his Reasons for Sentence when the matters complained of in this case were before him:

...Society must be protected against practices such as this. The Ontario Court of Appeal...has clearly set forth that the principal factor, principal purpose in sentencing, must be the protection of Society...

...I have been reminded that maximum penalties are reserved for the worst example of the offence committed by the worst offender. And I have been urged to find that neither description is apt here. But it must be remembered that in addition to cold blooded, premeditated tampering for profit that the accused Corporation has in fact profited. I was urged to find that this is not the worst offence because these are only fifteen examples out of the hundreds of vehicles that had been sold. I cannot accede to that argument...I can think of very little that would be more serious, that would be more blatant...

During the presentation of evidence for the Applicants on the first day of the hearing, the Tribunal heard the testimony of a Mr. K. Arnold, who is Branch Manager of Chrysler Credit Canada Ltd., and he brought a letter beginning "To Whom It May Concern" from a Mr. W.R. Bradley who is the Vice-President of Chrysler Credit Canada Ltd. It seems that Mr. Coates' operations involve up to ten million dollars in credit being made available to him by Chrysler Credit and both Mr. Arnold and Mr. Bradley appear to have a high opinion of Mr. Coates and Centennial Plymouth Chrysler (1973) Ltd. and would like to see his and his Companies' registrations continued. That is because they are "efficient" and very profitable. But efficient and profitable operations which are also dishonest are not in the public interest which it is our duty to protect. When asked if he understood the word "condonation" or "condone", Mr. Arnold suggested they meant something like "we can live with it".

Odometer altering designed to bilk the public into paying more for an expensive product like a used motor car than it is worth is not something that the Registrar of Motor Vehicle Dealers and Salesmen is prepared to live with and neither is this Tribunal.

The fact that Mr. Coates' operation has been efficient and profitable must draw us to the conclusion that the fraudulent misdeeds were unnecessary to ensure the success or survival of his business but were simply motivated by greed and by some compulsion to cheat. In our view, greedy and compulsive cheats are the worst kind.

Accordingly and by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal upholds the Registrar's Proposal, finding that the corporate Applicants are disentitled to registration by operation of subsection 5(c) and Mr. Coates by that of subsections 5(a) and (b), and Orders and Directs the Registrar to implement the same forthwith upon the issuance of this Decision and the Reasons therefore.

Although the Decision does not turn on this point, returning briefly to subsection 5(1):

- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

The Tribunal is of the opinion that the relevant pronoun "he" ought to be interpreted as meaning "he", "her", or "it" as the context may best be served, so that a corporate entity ought not to be excluded from the scope of its operation. \*

Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by Centennial Plymouth Chrysler (1973) Ltd and D. Brown Motors (Barrie) Limited and Gordon Douglas Coates. The appeal had not been concluded at the time of this publication.



EASTWAY FORD SALES LIMITED  
WILLIAM R. STOLLERY and  
MICHAEL JAMES STOLLERY

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE THE REGISTRATIONS

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN, PRESIDING  
WATSON W. EVANS, MEMBER  
WILLIAM J. GUIGNION, MEMBER

APPEARANCES:

LINDA ROBINSON, representing  
Eastway Ford Sales Limited

DOUGLAS G. GUNN, Q.C. and DAVID M. MILLER,  
representing William R. Stollery and  
Michael James Stollery

STEPHEN A. AUSTIN, representing the Registrar of  
Motor Vehicle Dealers & Salesmen

DATES OF

HEARING: 28, 29 August 1986

St. Thomas

REASONS FOR DECISION AND ORDER

The Tribunal finds the following are the relevant  
facts of this case:

1. That a certain statute exists among the current  
Revised Statutes of Ontario being Chapter 453 thereof, The  
Retail Business Holidays Act;

2. That the first two sections thereof reads in part as  
follows:

1.-(1) In this Act,

(a) "holiday" means, [inter alia]

. . .

(iii) Victoria Day

. . .

(ix) Sunday, and

(x) any other public holiday declared by proclamation of the Lieutenant Governor to be a holiday for the purposes of this Act;

(b) "retail business" means the selling or offering for sale of goods or services by retail;

(c) "retail business establishment" means the premises where a retail business is carried on.

. . .

2.-(1) Every person carrying on a retail business in a retail business establishment shall ensure that no member of the public is admitted thereto and no goods or services are sold or offered for sale therein by retail on a holiday.

(2) No person employed by or acting on behalf of a person carrying on a retail business in a retail business establishment shall

(a) sell or offer for sale any goods or services therein by retail; or

(b) admit members of the public thereto on a holiday.

The Tribunal also finds:

3. That there is good and sufficient evidence that the Applicants were carrying on business in violation of that statute. The precise particulars of that evidence need not, in the opinion of the Tribunal, be spelled out in this Reasons for Decision but are contained in the record of the hearing and have been admitted by the parties.

4. That the Applicants or the officers and directors of the corporate Applicant are or have been of the opinion that the statute in question is ultra vires or otherwise invalid or likely to be so found by a court of competent jurisdiction in due course as a result of proceedings already in train.

The Tribunal is of the opinion that the statute in question either may or may not at some future time eventually be struck down either by the Supreme Court of Canada or otherwise. The Tribunal is also of the opinion that the statute remains the law of Ontario until that happens.

Section 5 of the Motor Vehicle Dealers Act reads:

5.-(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

. . . . .

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or

(c) the applicant is a corporation and,

. . . . .

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty...

In the opinion of the Tribunal there is, as stated, good and sufficient evidence that the Applicants have, to wit, between January 19th, 1986 and May 25th, 1986 carried on business contrary to law and also contrary to honesty and integrity in that they flagrantly flouted The Retail Business Holidays Act on at least 19 separate occasions by carrying on business on Sundays and on Victoria Day.

The Registrar seeks and proposes that the respective registrations of the Applicants be revoked on the grounds that the past conduct of the Applicants and that of the officers and directors of the corporate Applicant affords reasonable ground for belief that they will not carry on business in accordance with law and with integrity and honesty.

The Tribunal is satisfied that the Applicants have, during the period cited, flouted The Retail Business Holidays Act as alleged. It is also the view that this was very wrong

and was motivated by the desire to achieve a profit in an unfair manner by taking advantage of competitors who are in the habit of obeying the law and who remain closed on Sundays and other holidays. Such conduct ought to be suppressed. The Tribunal is also repelled by what it perceives from the evidence before it that the conduct of the Applicants has been self-interested conduct, misrepresented as a crusade against an unjust law. However, probably due more to the belated goading of the Ford Motor Company than to any moral consideration, the Applicants have, as the Tribunal is satisfied, discontinued the practices complained of and appear, in our view, unlikely to renew them.

Therefore, having regard to the language of Section 5(1)(b) of the Motor Vehicle Dealers Act which is future-looking rather than retrospective, and also relying on Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal is bound to vary the Proposal of the Registrar and to permit the Applicants to retain their respective registrations upon the term and condition that the provisions of The Retail Business Holidays Act be strictly observed by the Applicants for so long as it remains law in this Province. Further, it invests the Registrar with the power to revoke any or all such registrations at his unfettered discretion should there be, in his opinion, any further violation of the said Retail Business Holidays Act or any other legislation which may at any future time be enacted to replace it.

The Tribunal strongly censures the Applicants and regrets its inability to penalize them in costs.

To summarize, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar of Motor Vehicle Dealers and Salesmen to refrain from implementing his Proposal at this time or until such future time as, in his discretion, he perceives the Applicants or any one of them to be in commission of any fresh violation of The Retail Business Holidays Act during its currency or any other legislation which may at any future time be enacted by the Legislature of Ontario to replace it. \*

\* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Registrar of Motor Vehicle Dealers and Salesmen. The appeal had not been concluded at the time of this publication.

RICHARD S. MASON

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN  
TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN, PRESIDING  
BARBARA J. SHAND, MEMBER  
ROBERT CONNOR, MEMBER

APPEARANCES:

FRED HEEREMA, representing the Applicant

STEPHEN P. MARTIN, representing the Registrar of  
Motor Vehicle Dealers and Salesmen

DATE OF

HEARING: 15 July 1986

London

# REASONS FOR DECISION AND ORDER

Richard S. Mason, the Applicant, has applied for re-registration as a salesman pursuant to the Motor Vehicle Dealers Act, R.S.O. 1980. The Registrar of Motor Vehicle Dealers and Salesmen has proposed to refuse registration to him on the grounds that, in his opinion, the Applicant is not entitled to registration under Section 5 of the Act as his past conduct affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty. In support of that Proposal, it has been alleged as follows:

1) From the month of November 1982 through until the month of December 1984, the Applicant was registered under the Act as a motor vehicle salesman in the employ of Highbury Ford Sales Ltd. in London, Ontario.

2) The Applicant's employment with Highbury Ford Sales Ltd. was terminated on or about the 19th day of December, 1984 for reasons that he did 'convert deposits to his own use.'

3) Subsequently, the Applicant made application to be registered as a motor vehicle salesman in the employ of London Motor Products. That employment was terminated prior to the issue of registration and the application was abandoned.

4) By application dated August 14, 1985, the Applicant did apply under the Act to be registered as a motor vehicle salesman in the employ of Eastway Ford Sales Ltd in St Thomas, Ontario.

That application was the basis for this proposal.

5) On or about the 15th day of October, 1985, the Applicant met with the Registrar under the Act at the Ministry offices in Toronto. At that meeting, the Applicant admitted to the Registrar that he had converted the proceeds from the sale of motor vehicles by Highbury Ford Sales Ltd. to his own use.

In the opinion of the Tribunal the Registrar's allegations have been substantially established by the evidence set before the Tribunal during the course of this hearing although, as perhaps may be inevitable, these bare allegations offer rather less than a full and complete picture of all the details and facts of the case. It seems that the conversion of funds referred to was never the subject of any criminal charges. It also seems possible that the Applicant may have been under the mistaken impression that he was entitled to take these monies because he may have thought that funds were owing to him by his employer, Highbury Ford Sales Ltd. and that he was merely setting off money which came into his hands against money that he may have thought was due to him. But, notwithstanding that contention, the Tribunal is satisfied that the taking of funds complained of, which was the taking of deposit monies put into his hands by car buyers in eight cases, was grossly improper, that these funds were trust funds and that even if the Applicant did not know that such conversion was wrong he ought to have known it and therefore, whether he knew it or not, in either case, it cannot be justified. The Tribunal is satisfied that until he has made restitution, the Applicant is not a fit person to hold the registration sought.



The Applicant has asserted that monies are owing to him by his former employer and remain owing to him and that he intends to bring action to recover these. Section 8 of the Act provides "that a further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed". Should the Applicant manage to successfully sue Highbury in the appropriate court of law thereby establishing the validity of his contention, it is our view that the Registrar should entertain a fresh application for registration.

In the meantime, while it is extremely reluctant to deprive this gentleman of his livelihood and noting that he has been in many ways a good motor vehicle salesman, and that he has held such employment throughout most of his working life so far, the Tribunal is of the opinion that the Registrar's Proposal should be upheld. The Tribunal reaches this conclusion with great regret; however, the Applicant has demonstrated very improper conduct in our opinion as well as a very inappropriate attitude and a profound lack of appreciation of the responsibilities of a registrant under this Act, particularly of the fiduciary duties of such a registrant. And yet the Applicant's misconduct was something less than that of a thief properly so-called and we hope that he will find the means to improve his conduct in future, even that he will build a record of good conduct such as to enable him to live down the present complaints against him and regain the right to occupy a position of trust and confidence. Perhaps a good beginning would be for him to restore to the insurance or bonding company the loss which it has sustained through his misconduct. Were he to do that at some not too distant point in time we would urge the Registrar to favourably entertain a fresh application for registration.

Meanwhile for the present, and by virtue of the authority vested in it by Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

PETER PSARROS

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN  
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
HERBERT KEARNEY, MEMBER

APPEARANCES:  
JOHN BURTON, representing the Registrar of  
Motor Vehicle Dealers and Salesmen

No one appearing for the Applicant

DATE OF  
HEARING: 6 November 1986 Toronto

REASONS FOR DECISION AND ORDER

The Tribunal has now had the opportunity of reading the Proposal of the Registrar. Since no person is present to represent the Applicant, and the Applicant himself is not present, and having read the Affidavit of Service which establishes, in the opinion of the Tribunal, full proof that the Applicant was served with the Notice of Hearing, and upon motion of Mr. Burton, counsel for the Registrar, it is hereby ordered that the Applicant's appeal be refused and the Registrar is directed to carry out his Proposal.

FRANK A. SZARKO

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN  
TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN, PRESIDING  
BARBARA J. SHAND, MEMBER  
HERBERT KEARNEY, MEMBER

APPEARANCES:

FRANK A. SZARKO, on his own behalf

STEPHEN AUSTIN, representing the Registrar  
of Motor Vehicle Dealers and Salesmen

DATE OF

HEARING: 12 November 1985

Toronto

#### REASONS FOR DECISION AND ORDER

The Applicant, having requested a hearing in the manner prescribed by the Act, attended without counsel. His problem, which was the intended subject of the hearing, was that he had been refused registration as a motor vehicle salesman because of his lengthy criminal record (which extended over a substantial period of time) and also because of allegedly false or incomplete answers provided by him in his form of application.

After the hearing had started, the Applicant interrupted the proceedings to state that he had not known that they would be so formal and that he desired to obtain a lawyer. The Tribunal was disinclined to grant an adjournment, at least not until it had further evidence as to the nature of the matter. Shortly thereafter, the Applicant announced his intention to wholly withdraw his application for registration at this time.

He is, of course, free to make a further application for registration if he so desires in accordance with the provisions of the Act. But in the meantime, he having withdrawn his current application (proprio motu), the Registrar's objections to that application cease to be in issue and the purpose of the hearing lapses.

By virtue of the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, the Tribunal orders and directs the Registrar not to register the Applicant and to implement his Proposal (filed) to that extent. It makes no findings, at this time, as to the Registrar's reasons underlying his Proposal.

ABCON LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
JOHN CORSI, MEMBER

APPEARANCES:

JOHN T. GOODCHILD, representing the Applicant

BRIAN M. CHU, representing the Registrar under the  
Ontario New Home Warranties Plan Act

DATES OF 17, 18 July 1985  
HEARING: 29 January 1986

Kingston

# REASONS FOR DECISION AND ORDER

This matter was brought on for hearing July 17th, 1985 in the City of Kingston and continued on the 18th day of July whereupon it was adjourned and has, this day, the 29th day of January 1986 been continued in the City of Kingston.

At the commencement of the proceedings January 29th, a discussion took place between the Vice-Chairman of the Tribunal and learned counsel as a result of which an agreement was reached as to the basic facts of the case. In evidence of such agreement a document was executed by Mr. Goodchild on behalf of the Applicant, Abcon Limited, and Mr. Chu on behalf of the Registrar which has been filed with the Tribunal as Exhibit 34 and which is entitled Agreed Statement of Facts, reading as follows:

1. Abcon Limited (hereinafter referred to as "Abcon") is a registered builder in the Ontario New Home Warranty Program (hereinafter referred to as "O.N.H.W.P.")
2. The subject property is enrolled in O.N.H.W.P.
3. Abcon has entered into a vendor/builder agreement with O.N.H.W.P.

4. Abcon entered into an agreement of Purchase and Sale with Mr. and Mrs. Silva which included the construction of a house and septic system.
5. O.N.H.W.P. received complaints with respect to the septic system on the subject property from the home owner within one year of possession.
6. Notices from O.N.H.W.P. to Abcon to remedy defective septic system were received by Abcon and were not complied with.
7. O.N.H.W.P. arranged for the replacement of the defective septic system at a cost subsequently invoiced to Abcon.
8. All demands by O.N.H.W.P. for reimbursement with respect to subject property were received by Abcon and have not been paid by Abcon.
9. The original septic system installed on the subject property failed to function properly as a result of either a failure to construct it in a workmanlike manner or a defect or defects in material.

Dated at Kingston this 29th day of January, 1986,

and the said agreement is over the signatures of counsel for both parties as aforesaid.

The Warranty which has been at issue in this case is set out in Section 13(1) of the Ontario New Home Warranties Act Section 13(1)(a)(i)(ii)(iii), (b) and (c).

In this case, upon the facts as agreed to by the parties as aforesaid above, there is a clear breach of the warranty that the home should be fit for habitation. There also appears to be a major structural defect to the extent that the use for which the building was intended, that is say, residential occupancy in the normal course has been adversely and materially affected by the malfunction of the septic system.



The Tribunal has been referred to its decision in the case of G.H. Perkins Construction Ltd, released December 13th, 1985 in which a Tribunal's earlier decision in the case of Ernest L. Harper Limited was referred to with approval. The following language was employed:

Responsibility...rests with the person in charge, and, in a house construction project, that person is the builder. He is responsible both to the new homeowner and to the Warranty Program during the full period of the warranty. He may have a separate claim over against the sub-contractor, or even, in some hypothetical case, against an inspector if he can prove, say, gross negligence, wilful intent to defraud or some malicious intent to do damage or injury to him which is recognizable under law; but any such case would be a matter between the builder and the party or parties who had done injury to the builder, and the place to settle it would be in the court of proper competence and jurisdiction in the course of an action brought by the builder, but not within the context of the relationships he has with the Corporation or the new homeowner, which are clearly encompassed by the Contract of Purchase and Sale and the Vendor/Builder Agreement.

The following language is also to be found in page 8 of the Perkins decision:

Responsibility and fault are, however, two very distinct concepts.

The Tribunal adopts the last stated concept or finding, and is disposed in the present case to reiterate its belief that this assertion is very true, namely, that "responsibility and fault" are two different and distinct concepts. Responsibility lies with the builder by virtue of the obligations of the builder under the statute. In the present case, the Tribunal makes no finding as to fault.

Notwithstanding that the builder may or may not be at fault, the Tribunal is bound to hold that the builder has a responsibility in this case to indemnify the Warranty Program for its outlay.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Registrar is directed to carry out the proposal to revoke the registration of the applicant under the Plan unless before the 1st day of June, 1986, the applicant shall have reimbursed the Program the full sum of \$5,923.00. \*

\* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by Abcon Limited. The appeal had not been concluded at the time of this publication.

ERNST U. BOEHLAU

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
LOUIS A. RICE, MEMBER

APPEARANCES:  
ERNST U. BOEHLAU, appearing on his own behalf  
CAROL STREET, representing the  
Ontario New Home Warranty Program

DATE OF  
HEARING: 29 April 1986 Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Ernst Boehlau, appeals the Decision of the Ontario New Home Warranty Program dated January 30, 1986, disallowing a claim made under Section 14(1)(a) of the Ontario New Home Warranties Plan Act for a refund of a deposit.

This subsection reads in part as follows:

Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

. . . . .

the person...is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

The reason given on behalf of the Program for allowing the claim was that Mr. Boehlau, having reached a settlement with the vendor and having signed a Release, did not have a cause of action for damages against the vendor as required by the Act. In his claim, Mr. Boehlau had stated that he "was forced under duress (Supreme Court of Ontario 19906/84) to settle for \$16,000."

No witnesses were called by either party. A statement of Agreed Facts was filed at the commencement of the hearing as were two other documents containing, primarily, copies of relevant correspondence.

Very briefly, the events leading up to the claim are as follows:

- Mr. Boehlau entered into an Agreement of Purchase and Sale with Coolmur Properties Limited on June 15, 1981, for the purchase of a condominium unit in Toronto and paid \$20,000 as a deposit;
- the original closing date was postponed and by agreement was extended to January 31, 1983. The transaction did not close on that date and apparently neither party tendered upon the other;
- by letter dated March 17, 1983, the solicitor for Mr. Boehlau, then Mr. Gary Braund, demanded the return of the \$20,000 deposit from the vendor, Coolmur, stating that "the premises were not fit for habitation or occupancy in any way";
- the vendor's solicitors responded in May, 1983 that it was the vendor's position that Mr. Boehlau was in default of the Agreement of Purchase and Sale by refusing to close and that the deposit was therefore forfeit;

- some six months later, a new solicitor retained by Mr. Boehlau again requested the return of the \$20,000 deposit from the vendor, together with accrued interest. By letter dated January 16, 1984, this claim was reduced to \$20,000;
- the offer to settle for \$20,000 was refused and by letter dated January 25, 1984, the vendor proposed to settle for a payment of \$12,000 and the execution of a release and agreement as to confidentiality;
- Mr. Boehlau's solicitor responded by letter dated February 3, 1984, in part, as follows:

We acknowledge receipt of your letter dated January 25, 1984 and have discussed the contents thereof with our client. Our client has instructed us to offer to settle the matter upon payment of the sum of \$16,000 all inclusive;

- a copy of this letter was sent to Mr. Boehlau;
- this proposal was accepted by the vendor's solicitor by letter dated February 10, 1984;
- when Mr. Boehlau subsequently refused to accept the \$16,000 and to sign the release and undertaking requested, the vendor's solicitor issued a writ of summons for a declaration that the settlement made between the parties was a valid and binding settlement between them. The summons was dated July 23, 1984;
- by letter dated July 27, 1984, the third solicitor retained by Mr. Boehlau confirmed that the payment of \$16,000 by the vendor would be in full settlement of any claim by Mr. Boehlau;
- upon payment of this amount, Mr. Boehlau signed the following Release on July 17, 1984:

## RELEASE

KNOW ALL MEN BY THESE PRESENTS THAT I, ERNST-ULRICH BOEHLAU, in consideration of payment to me of the sum of SIXTEEN THOUSAND (\$16,000.00) DOLLARS and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby remise, release and forever discharge COOLMUR PROPERTIES LIMITED, its successors and assigns, from all matters of action, causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, claims and demands whatsoever which against it I ever had, now have or which my heirs, executors, administrators, successors and assigns, or any of them hereafter can, shall or may have for or by reason of any cause, matter or thing arising with regard to all matters of every description and kind to date and without limiting the generality of the foregoing, all matters in issue between the parties arising out of an Agreement of Purchase and Sale dated June 15, 1981 and subsequently amended, I was named as Purchaser and COOLMUR PROPERTIES LIMITED was named as Vendor of Suite 613 (amended to be Suite 611), 71 Front Street East, in the City of Toronto in the Municipality of Metropolitan Toronto.

PAYMENT of the above amount will not be treated as an admission of liability by COOLMUR PROPERTIES LIMITED with respect to any of these matters.

AND for said consideration I covenant and agree not to make any claim or take any proceedings against any other person, firm or corporation for contribution or indemnity at law or in equity in respect to the matters herein released.

- the claim for the remaining \$4,000 plus interest on the amount of \$20,000 which had accrued since 1982 was filed by Mr. Boehlau on or about January 17, 1986



For the Applicant to succeed, he must satisfy this Tribunal that he has a cause of action resulting from the vendor's failure to perform the contract.

On the facts before it, the Tribunal finds that sometime between January 25, 1984 when the offer to settle for \$12,000 was made by the vendor's solicitor and February 3, 1984, when Mr. Boehlau's solicitor counter offered to settle for \$16,000 Mr. Boehlau had made a decision to settle for not less than \$16,000. Mr. Boehlau initially told the Tribunal that he had not instructed his solicitor to make this offer of settlement. (If indeed his solicitor acted without his consent or went beyond his instructions, and the Tribunal makes no finding on this issue, Mr. Boehlau's recourse is not to the Program or to this Tribunal, but elsewhere). However, later in the hearing, Mr. Boehlau informed the Tribunal that he told his solicitor not to settle "for less than \$16,000". A similar statement appears in a copy of a letter to the vendor's solicitor dated July 24, 1984 on the letterhead of Mr. Boehlau, found in Exhibit 3. There Mr. Boehlau states: "I have to confirm 1. I never intended to settle for less than \$16,000. - of the deposit (downpayment)."

However, after the offer to settle for this amount was accepted, Mr. Boehlau heard that other purchasers, who had been in the same position as he was, had been successful in obtaining the full refund of their deposit from the vendor, he changed his mind about accepting the \$16,000 in full settlement. By that time it was too late to do so. Therefore, in retrospect as things turned out, his earlier decision to accept \$16,000, which in the Tribunal's opinion was not made under duress, was probably a poor decision, but it was his decision to make. The Tribunal agrees with the Program that in making this decision, and finally signing the Release, he forfeited his rights to compensation under the Act because he no longer has a cause of action in damages against the vendor.

In the opinion of the Tribunal, Mr. Boehlau has failed to prove his claim to the Tribunal's satisfaction. The Program's decision is therefore upheld.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

DOMENIC CAFERRI

APPEAL FROM THE DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
D. H. MacFARLANE, MEMBER

APPEARANCES:

JOSEPH PICCININNO, as Agent

CAROL STREET, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 11 July 1986

Toronto

# REASONS FOR DECISION AND ORDER

The Applicants, Mr. and Mrs. Domenic Caferrri, have claimed against the Ontario New Home Warranties Program because parts of the basement floor of their home have settled. The gap between the floor and the wall varies from about 3/4 of an inch to 2 1/2 inches. There is a dip in the floor itself and a crack which runs from east to west for about twenty-two feet.

The Program denied the claim on the basis that the settlement of the basement floor did not constitute a major structural defect as defined in the Regulations. The evidence before this Tribunal is that there are no cracks on the exterior walls of the house which would indicate that there has been a shifting in the footings or any other damage which affects the load-bearing portions of the wall or pillars. Therefore, while there may have been a defect in workmanship, it is not such as to affect the load-bearing portion of the house.

The evidence shows that the basement is being used by the owners and there is no danger in so doing. We therefore find that the use of the whole building, including the basement, has not been so adversely affected by the settlement of the basement floor, that it cannot be used.

The Tribunal, however sympathetic it may be to the claimants, is bound by the narrow provisions of the Act and, although we were concerned at the cost to the Caferris to make the necessary repairs, we have no option in the circumstances of this case but to disallow the claim.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

R. AND MRS. EDWARD DEICHSEL

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC Q.C., CHAIRMAN, PRESIDING  
KENNETH VAN HAMME, MEMBER  
JOHN CORSI, MEMBER

APPEARANCES:

EDWARD AND KRISTINA DEICHSEL  
appearing on their own behalf

CAROL STREET, representing the  
Ontario New Home Warranty Program

DATE OF HEARING: 16 September 1986 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a Decision of the Ontario New Home Warranty Program dated June 2nd, 1986. The Applicants' claim before this Tribunal is for an alleged defect in workmanship or materials resulting in many cracks in the basement floor of their home.

Section 13 of the Ontario New Home Warranties Plan Act describes the warranty which is provided by this statute. As has been noted by this Tribunal many times before, the warranty is fairly complete during the first year although even it does not cover normal shrinkage in materials caused by drying after construction. However, during the next following four years, the warranty is confined to what has been called a "major structural defect".

Since the Deichsel claim was made beyond one year of the warranty, in order to succeed, it was incumbent upon the applicants to demonstrate that the claim was in fact based upon the existence of a major structural defect as defined in the regulation to the Act. Specifically it was incumbent upon Mr. and Mrs. Deichsel to demonstrate that the defect in workmanship or materials resulted either in the failure in the load bearing portion of the house or which materially and adversely affected the use of the whole house. In other words, under the Act, the Deichsels would have to satisfy the Tribunal that their house was in danger virtually of falling down or was totally unfit to be used as a residence.

Mrs. Deichsel informed the Tribunal that although there were a few cracks in the basement floor in the first year, she took no action to report them to the builder or to the Program, being under the impression that the full warranty was in effect for the full five years. She said that more cracks have appeared during the interim and that she is concerned about the effect of these cracks and possible new ones in the future. Mrs. Deichsel said that the basement is in full use now. She estimated that the cost to replace the floor would be in excess of \$2,500.00 but that the Deichsels would be prepared to accept that amount for full compensation.

Mr. Todd, an inspector, appearing for the Program confirmed that there were many cracks in the floor but he said that this was not abnormal. It was his evidence that most of the cracks were hairline although in several places a business card could be inserted. He did not see any evidence of water penetration or deflection in the floor. He attributed the cracks to normal shrinkage and possibly some slight settlement. It was his opinion that the cracks do not affect the load bearing portion of the building or the load bearing function. His evidence was not disputed except that it was Mrs. Deichsel's opinion that at the widest point of the cracks two 25 cent coins could be inserted. There were no photographs tendered to show the cracks.

Upon the evidence before it, the Tribunal finds that while there may be a defect in workmanship or materials, there has been no failure of any load bearing portion of the building, nor has its load bearing function been materially and adversely affected. Neither do the cracks in the basement floor come within the definition or the meaning of "major cracks in basement walls".

The Tribunal also finds that these cracks do not materially and adversely affect the use of the home for the purpose for which it was intended, namely residential occupancy in the normal course. The Tribunal understands the feelings of Mr. and Mrs. Deichsel and their evident concern about the flaw in their home. But however sympathetic the Tribunal may be with the Applicants, as it tried to explain to them at the outset, it must render its decision in accordance with the provisions of the Act and Regulations and under these provisions, the Applicants' claim must fail.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to disallow the claim.

MR. AND MRS. R.T. DOSHI

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
MARY G. CRITELLI, MEMBER  
D.H. MACFARLANE, MEMBER

APPEARANCES:

R.T. DOSHI, appearing on his own behalf

CAROL STREET, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 18 April 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program dated April 9th, 1985, wherein the Program concluded that two hairline cracks in the concrete basement foundation wall of the Applicant's home although allowing water penetration did not affect the load-bearing capabilities of the wall and consequently could not be considered as constituting a major structural defect as defined in the Regulations to the Ontario New Home Warranties Plan Act.

Since the claim was made beyond one year, in order to succeed, the Applicant must show that the defects are major structural defects. The definition is contained in Ontario Regulation 726, section 1, clause (o).

The evidence shows that the cracks in the north and south foundation walls are long. In the case of the north wall, running from the floor to the basement window. This crack is evident both inside the house and above ground on the outside. The crack on the south wall appears to run from the floor heading towards the beam pocket. The width was described by Mr. Doshi as wider than three or four business cards together, and by Mr. Thurston, the witness called by the Program, as less than the width of one plastic business card.



According to the evidence, Mr. Thurston attempted to insert a business card at the widest point in the cracks but could not do so. Mr. Thurston also testified that there has been no deflection in either the foundation walls or the brick veneer on the upper stories. Pictures taken by both Mr. Doshi and Mr. Thurston and entered as exhibits in this case, indicate that there has been water seepage through these cracks. Mr. Doshi testified, however, that the basement is used, as is the rest of the house.

In her summation, counsel for the Program directed the Tribunal to two earlier decisions, both of which dealt with foundation cracks. Although the Tribunal is not bound by the earlier decisions, and it must decide each case on its own facts, the decisions in the Mundi case and in the Morash case were helpful in its deliberations.

On the evidence before it, the Tribunal finds that there has been no failure in any load-bearing portion of the building, nor has its load-bearing function been materially and adversely affected. The cracks do not come within the inclusion of "major cracks in basement walls". The evidence shows that even though the cracks are lengthy, they are fine. The fact that water seeps through the cracks does not indicate a major crack.

The Tribunal also finds that seepage of the water through the cracks is not such as to materially and adversely affect the use of the whole home or even of the basement. The Tribunal is in sympathy with the Applicants but under the Act and the Regulations in accordance with which the Tribunal must render its decision, this claim cannot succeed.

Accordingly the appeal fails and by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MR. AND MRS. D. G. DRAPER

APPEAL FROM THE DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, VICE-CHAIRMAN, PRESIDING  
DR. STUART E. ROSENBERG, MEMBER  
D. H. MacFARLANE, MEMBER

APPEARANCES:

MR. AND MRS. D. G. DRAPER  
appearing on their own behalf

CAROL STREET, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 3 July 1986

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing pursuant to Section 16(3) of the Ontario New Home Warranties Plan Act. The Applicants' claim to the Ontario New Home Warranty Program was made in the fifth year of occupancy of their home. Accordingly, they can only succeed in their claim if they satisfy this Tribunal that they have suffered damages because of a major structural defect as that term is defined in the Regulations, particularly Regulation 726, section 1, subsection (o).

The Applicants' complaint relates to a condition that is commonly known as roof truss uplift. This condition appeared in their home during the third year of occupancy. There has occurred on the upper floor of the Applicants' home, a separation of the drywall ceiling and the partition walls. The degree of separation varies with the seasons of the year and it is at its worst during the winter months when, as the Applicants' evidence indicates, the separation reaches 3/4 of an inch at the worst location. The separation is not occurring at the exterior perimeter walls but is confined to the partition walls, particularly those near the centre partition of the house, including the upstairs foyer and the southwest bedroom. The total combined length of these separation cracks is approximately twelve feet.

It was the evidence of Mr. Thurston, an inspector with the Ontario New Home Warranty Program, and this Tribunal accepts his evidence, that the likely cause of the roof truss uplift condition is the lengthening of the top cords of the roof truss as a result of moisture absorption in the winter months. The bottom cords, which are covered by insulation, do not absorb moisture at the same rate, and tend to stay the same length. The result is that the whole truss tends to arch upwardly thus separating from the partition walls.

Mr. Draper's evidence indicated that his major complaint is that these separation cracks are unsightly and would deter a prospective purchaser if not repaired. He testified that the Applicants' use of their home has not been affected.

While the Tribunal sympathizes with the Applicants' complaint, it is restricted to the definition of major structural defect that is set out in the Regulations. While the roof truss is a load-bearing portion of the building, there is no evidence before the Tribunal to satisfy it that a failure of the roof truss has occurred or that there has been any adverse effect on its load-bearing function. Nor is there any evidence to show that the use of the building has been adversely affected. Neither does the condition described in the evidence amount to a serious distortion of the roof structure. The condition is primarily an aesthetic defect and does not comprise a major structural defect.

Accordingly, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

ANTONIO MULAS, operating as  
DYNASTY CONSTRUCTION

APPEAL FROM THE PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MARY CRITELLI, VICE-CHAIRMAN, PRESIDING  
DR. STUART E. ROSENBERG, MEMBER  
LOUIS A. RICE, MEMBER

APPEARANCES:

CAROL STREET, representing the  
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF  
HEARING: 21 July 1986

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing pursuant to Section 9(2) of the Ontario New Home Warranties Plan Act to review the Proposal of the Registrar under Section 9(1) of that Act to refuse to renew the registration of Antonio Mulas operating as Dynasty Construction.

The reasons for the Proposal given by the Registrar are set out in the Notice of Proposal which forms part of Exhibit 3 as follows:

1) Pursuant to the provisions of Section 8(2) of the Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350 (the 'Act'), the Registrar, having regard to your financial position, finds you cannot reasonably be expected to be financially responsible for the conduct of your undertakings as required by the provisions of Section 7(1)(a) of the Act, TO WIT:

(a) You have failed to provide a financial statement or in the alternative a personal net worth statement of the principal of the

company requested of you by letters dated January 14th, 1986 and February 7th, 1986 and thereby have failed to provide sufficient evidence of financial ability as required by the Registrar.

2) Pursuant to the provisions of Section 8(2) of the Act, you are in breach of a condition of registration, TO WIT:

(a) You have failed to comply with subsections 5 and 6 of Regulation 728 requiring you to furnish such documentation, as the Registrar may require and request, and which were requested in accordance with the letters referred to in paragraph 1(a) above.

Subsequent to the issuance of the Notice of Proposal, the builder supplied a financial statement to the Program and this was reviewed by the Director of Registration and Enrolments, Mr. Johnson, who gave evidence before the Tribunal today. He indicated that, after reviewing the statement, he concluded that, based on the number of homes to be constructed the company was insufficiently capitalized to proceed as planned.

Mr. Johnson wrote to the builder by letter dated July 1, 1986 and this letter is part of Exhibit 3 as well, at Tab 10 and in that letter he stated in part as follows:

Due to the number of houses you presently have in inventory (eleven) and the number of homes proposed for future construction (five), we find the financial statements insufficient to substantiate these numbers. Therefore, we once again request an up to date notarized statement of personal net worth in order that we may satisfy ourselves that there is sufficient financial strenght (sic) to support the level of construction anticipated, as well as, the homes currently under construction. As this requirement forms part of the notice of proposal which was issued on March 14th, 1986, if the same is

not provided prior to the hearing, we are prepared to proceed as originally intended.

The Tribunal has heard evidence that, since that letter was sent, there has not been any further evidence received from the builder as to his financial ability and, in particular, no personal net worth statement has been provided.

The builder had requested this hearing, however he has not appeared today although he was duly served with a Notice of the Hearing and the hearing proceeded in his absence pursuant to the authority given to this Tribunal under the Statutory Powers Procedure Act. The Tribunal finds that the Registrar has acted properly in refusing to renew the registration for the reasons set out in the Notice of Proposal and the Tribunal therefore directs the Registrar to carry out his Proposal.



KENNETH EARLEY

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC Q.C., CHAIRMAN, PRESIDING  
KENNETH VAN HAMME, MEMBER  
D. H. MacFARLANE, MEMBER

APPEARANCES:

KENNETH EARLEY, appearing on his own behalf

CAROL STREET, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 27 March 1986

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Kenneth Earley, appeals the Decision, dated September 3, 1985, of the Ontario New Home Warranty Program, wherein it disallowed a claim for a major structural defect in relation to a house owned by the Applicant.

It is common ground that the defects complained of by the Applicant were not brought to the attention of the Program within the one year period under which the Ontario New Home Warranties Plan Act takes effect. It appears that there was some confusion as to the commencement date of the warranty and Mr. Earley, therefore, missed the one year cut off date by some few days. The application, therefore, is brought under the provisions of section 14(1)(c) of the Act.

A "major structural defect" is defined in the regulations in the following terms:

(o) "major structural defect" means for the purposes of clause 13(1)(b) of the Act, any defect in workmanship or materials,

(i) that results in failure of the load-bearing portion of any building or materially or adversely affects its load-bearing function, or

- (ii) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damages arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

Very briefly, the complaints of the Applicant relate to cracks in the foundation walls of the house which have allowed water to penetrate into the basement, cracks in the mortar joints on each front corner of the garage between the join corner and the wall, and cracks in the mortar in the fireplace.

The Applicant appeared on his own behalf and called no witnesses. He did provide the Tribunal with numerous photographs which he took of the house to show the defects complained of. The photographs graphically showed the water damage in the basement resulting from the foundation cracks and the generally shoddy workmanship in the outside brick work and fireplace construction. The photographs taken by Mr. Thurston, an inspector with the Program, which were also filed with the Tribunal, showed the same defects.

The water damage in the basement clearly would affect the use and enjoyment of that part of the house by the owner. The poor workmanship on the outside brick work and the fireplace would also undoubtedly be a constant source of irritation to anyone who took pride in his home.

Originally, Mr. Earley only notified the Program of foundation crack in the south basement wall of the cold cellar and the cracks in the hearth. Although, as earlier stated, this notification was outside the one year warranty period, the Program agreed to repair the crack in the cold

cellar. As well, the Program has agreed to repair the crack on the east foundation wall which was located to the right of the hydroelectric panel and was thought to pose a safety hazard. The Program refused the claims related to the remaining defects on the basis that they did not constitute major structural defect as defined in the Act and regulation thereto.

It should be pointed out first of all that the premises in question have been inspected by the Program three times: on November 27, 1984; August 12, 1985; and March 10, 1986. The inspections were carried out by Mr. Thurston who was the only witness called on behalf of the Program.

The crack on the west wall was inspected twice. It was described by Mr. Thurston as running from the window to the floor and being hairline in width. On the second inspection, there was substantial water leakage with water running across the floor. However, Mr. Thurston could not see any variation in the crack between the two inspections, nor could he see any movement in the wall. He attributed the crack to the normal drying out process. In his expert opinion, there was no failure of the load-bearing portion of this wall and he, therefore, did not think that the crack could be considered a major structural defect.

Exhibits 6, 15F, 15G and 16G clearly show the water damage to the wall and the flooding on the floor of the basement. Until the repairs to this crack are made, this area of the house will undoubtedly have limited use. In her submission, Miss Street referred the Tribunal to two earlier decisions. The following sentence in the Kennedy decision, 1982, 11 CRAT at page 110 deserves repeating: "A major structural defect in our view and as we have found in the past must inter alia be one which renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse". On the evidence before it, the Tribunal cannot find that the load-bearing portion of the house is adversely affected as the result of the crack on the west wall or that the crack materially and adversely affects the use of the whole building as a residence. It, therefore, must confirm the disallowance of this part of the Applicant's claim.

The second matter in dispute, relating to the outside brick veneer of the house, are the cracks in the mortar running about 6 feet in length from the top of the garage door upwards to the roof overhang. These two cracks

appearing at the junction of the quoin and the regular wall are wider than a business card. In some places, the mortar is actually falling out.

Mr. Thurston noted that all the walls of the house are brick veneer and consequently bear no weight. He testified that he could not see any movement or deflection in the wall where the cracks appeared. He could not tell the Tribunal if the bricks forming the quoin were tied with metal ties to the rest of the wall because the ties would not normally show, but he thought they were in place because he had not seen further deterioration between visits to the house. In his view, these cracks occurred because of normal drying out and he did not consider the cracks as constituting a major structural defect.

While the method used by the builder to construct the quoin is cosmetically unattractive and probably contributed to the cracking, it is an acceptable method. The Tribunal has found in the past and does so now, that the cracking of brick veneer no matter how unsightly from an aesthetic point of view does not meet the criteria of a major structural defect and it, therefore, agrees with the Program's decision to disallow this portion of the Applicant's claim.

The last matter in dispute related to the construction of the fireplace. Mr. Earley advised the Program of cracks in the mortar in the hearth at the same time that he informed it about the cracks in the cold cellar - that is a few days after the first year warranty expired. However, for some reason, no inspection was made of the hearth during the first visit. Mr. Earley testified that during the first year, the cracks in the hearth had been repaired twice by the builder. Some time later, well beyond the first year of possession, Mr. Earley examined the construction of the fireplace from underneath and saw what can, at the very least, be described as careless or sloppy construction. According to Mr. Earley, a building inspector from the municipality called it a "poor job", but not a safety hazard.

By the time Mr. Thurston inspected the fireplace, a 300 - 400 pound insert had been placed in the fireplace. Mr. Thurston agreed that the construction of the concrete slab supporting the hearth was not well done but noted that there were no cracks in it. He did not think that it posed a safety hazard. In any event, the slab did not affect the

load-bearing portion of the house. He thought that the heavy insert in the fireplace may have contributed to the continued cracking of the mortar in the hearth, and since the claim was made beyond the first year, the defects did not fall within the meaning of a major structural defect. The Tribunal accepts this assessment, and the claim with respect to this item must also fail.

This Tribunal's jurisdiction does not extend to require the Program to reprimand builders on their careless construction practices, such as those described in this hearing. Nevertheless, the Tribunal feels obliged to say that if it did have such jurisdiction, it certainly would have exercised it. Given the present legislation, and although it is in sympathy with the Applicant, the Tribunal finds that it must disallow his claim.

Therefore by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

FIESTA CONSTRUCTION LTD.

APPEAL FROM THE PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
ALBERT LONGO, MEMBER

APPEARANCES:

CAROL STREET, representing the  
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 29 July 1986

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Fiesta Construction Inc., had requested a hearing after receiving a Notice of Proposal dated April 8th, 1986 under Section 8(2) of the Ontario New Home Warranties Plan Act from the Registrar of the Program to refuse to renew its registration under the Plan. A Notice of Amended Proposal was issued by the Registrar on July 27th, 1986, and the Tribunal is proceeding on the basis that the Applicant is appealing from that Proposal as well.

No one appeared on behalf of the Applicant. At the commencement of the hearing, counsel for the Program advised the Tribunal that she had spoken with Mr. Yack, the solicitor for the Applicant, who informed her that no one would be appearing on behalf of Fiesta and requesting through her an adjournment. The adjournment was objected to by the Program. The Tribunal noted that the hearing date today was peremptory and denied the adjournment. It thereupon proceeded with the hearing in the absence of the Applicant.

The issue between the parties was the failure of the Applicant, Fiesta, to rectify the very serious defects and deficiencies in accordance with a number of Conciliation Reports rendered by the Program over a period of a number of months beginning in December 1985. The latest Conciliation Report appears to be in June 1986.



The Applicant had been advised of these complaints by new homeowners and was informed of the inspection date. The Applicant was notified of the repairs required to be made, but has not responded in any way. The Warranty Program in some cases already had the repairs made or cash settlements paid, and in others is in the process of arranging to have the repairs made. The total cost to the Program for all repairs, plus excess conciliation fees, will be in the neighbourhood of some \$27,000.00. None of the monies already expended by the Program has been paid by the Applicant.

The Tribunal finds on the evidence that the Warranty Program has made reasonable efforts to advise the Applicant of its position and that the Program's letters to the Applicant were both received and ignored. The Tribunal finds that the steps taken by the Program to remedy the defects and deficiencies complained of were reasonable and justified in the circumstances. The Tribunal, absent any evidence to the contrary, also finds that the Warranty Program is justified in looking to the Applicant for repayment to the Plan of the present and future monies owing in respect of the repairs made and fees for the excess Conciliation Reports.

Therefore by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal to refuse to renew the registration of Fiesta Construction.

B. GODDEN

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
ALBERT LONGO, MEMBER

APPEARANCES:

CAROL STREET, representing the  
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 29 July 1986

Toronto

# DECISION AND ORDER

The Tribunal determines as follows:

1. By Notice of Adjournment (Exhibit 3) dated the 8th day of July, 1986, the Tribunal on its own motion adjourned the hearing scheduled for July 7th to the 29th day of July, 1986;

2. The Applicant having been given Notice of the Appointment for Hearing for the 7th day of July, 1986 as evidenced by Exhibit 2 which contained the further Notice

"....if you do not attend at the hearing  
the Commercial Registration Appeal Tribunal  
may proceed in your absence and you will not  
be entitled to any further notice in the  
proceedings."

3. The Applicant has not appeared.

4. No evidence has been placed before the Tribunal in respect of the claim.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

S. GOLDBERG

APPEAL FROM THE DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, VICE-CHAIRMAN, PRESIDING  
KENNETH VAN HAMME, MEMBER  
LOUIS A. RICE, MEMBER

APPEARANCES:

S. GOLDBERG, appearing on her own behalf

CAROL STREET, representing the  
Ontario New Home Warranty Program

DATE OF  
HEARING: 30 July 1986

Toronto

REASONS FOR DECISION AND ORDER

This has been a hearing pursuant to Section 16(2) of the Ontario New Home Warranties Plan Act to consider a claim made under Section 14 of that Act.

The claimant is the second owner of her home and took possession in the fourth year of the warranty period. Accordingly, in order to succeed in her claim, she must establish to the satisfaction of this Tribunal that she has suffered damages as the result of a major structural defect as that term is defined in the Regulations.

The Proof of Claim filed by the claimant describes two defects. The first is the unevenness of the floors in the living room, dining room and master bedroom. The second is a leak in the basement.

It is clear from the evidence of the claimant and of the witnesses testifying on behalf of the Program that the defects complained of are not major structural defects.

It was admitted by the claimant that the only reason she requested this hearing was because the Program had failed to assist her in finding tradesmen to repair the defects complained of. This Tribunal has no authority to direct the Program to provide such assistance as there is no legal obligation set out in the Act requiring the Tribunal to provide such assistance.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MR. AND MRS. J. GONZALEZ

APPEAL FROM THE DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN, PRESIDING  
DR. STUART E. ROSENBERG, MEMBER  
D.H. MACFARLANE, MEMBER

APPEARANCES:

MR. AND MRS. J. GONZALEZ,  
appearing on their own behalf

CAROL STREET, representing the  
Ontario New Home Warranty Program

DATE OF  
HEARING: 26 June 1986

Toronto

# REASONS FOR DECISION AND ORDER

The Applicants, Mr. and Mrs. Jose Gonzalez, appeal from a Decision of the New Home Warranty Program dated January 8th, 1986, refusing their claim which concerned an alleged "major structural defect" consisting of a certain leak-producing crack or cracks in the basement wall of the new home, a new home registered under the Plan.

The reason they had alleged a "major structural defect" was not so much because the problem was "major" rather than "minor" but because the first year of the warranty on their home had expired and there was no other type of claim in respect of their problem they could have made at the time. It seems the reason they were "late" in filing their claim was that they had fully and even repeatedly notified the builder of the situation within the first year and the builder had failed to rectify the problem and had, according to the evidence before us, repeatedly put them off with excuses or delaying tactics until the period of one year, the year first following the commencement of the warranty which is the currency of the broad warranty which would have covered the problem as it was described to us, had expired. During that initial twelve month period when the Applicants were attempting to deal with the builder as stated, they made the mistake of failing to rep

the problem in question to the Warranty Program either in writing or otherwise. By the time they had communicated with the Warranty Program, it was too late for them to claim rectification of the leakage problem on the ground of faulty workmanship or on any other ground, save the one ground in respect of which the warranty, frequently called the 5 year warranty, survived the initial one year period, that is to say, the ground of a "major structural defect" as defined.

The Warranty Program rejected the claim basing its decision on the interpretation of the statute and its Regulations which has hereinbefore been applied. In reaction to this, Mr. and Mrs. Gonzalez felt a strong sense of injustice.

The Tribunal notes that on average over the last few years at least 50% of the appeals heard by it have been under the Ontario New Home Warranties Plan Act and the majority of these have related to "major structural defects" brought to the Program's attention during the last four years of the warranty. Of these claims, the majority have been rejected by the Tribunal. Usually this has been because the nature of the claim in a given case has not satisfied the definition of "major structural defect" provided at section 1, clause (o) of Regulation 726 as amended under the Ontario New Home Warranties Plan Act which reads as follows:

(o) "major structural defect" means for the purposes of clause 13(1)(b) of the Act, any defect in workmanship or materials,

- (i) that results in failure of the load-bearing portion of any building or materially or adversely affects its load-bearing function, or
- (ii) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a



load-bearing portion of the building, damage to drains or services, damage to finishes and damages arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage;

In a line of previous decisions, the Tribunal has held that the words "that materially and adversely affects the use of such building for the purpose for which it was intended" mean the use of the whole of the building and not merely part of it (e.g. the basement) and as well, that the "purpose" for which a residence is intended must be residential occupancy in the normal course. The Tribunal has also held that communication to the builder of a problem, which may or may not be sufficiently grave as to constitute a "major structural defect", during the first year when the warranty is broader, covering defects in workmanship and material or failure to meet the standards of the Ontario Building Code, is not, per se, notice constructive or otherwise to the Warranty Program.

In the case presently before us, the Tribunal cannot escape the feeling that Mr. and Mrs. Gonzalez, who are in many ways typical of scores of Ontario residents, holders of the warranty provided by the Ontario New Home Warranty Program and members of the class which it was designed ostensibly to protect, are the victims of some degree of unfairness.

If this perception is well-founded, the Tribunal is bound to ask: Does the problem arise from some inherent inequity in the statute itself or, alternatively, is it the result of the manner in which the Tribunal has interpreted the statute over the years?

In the present case, the Tribunal believes that natural justice may not be served by the simple application of past precedent.

In considering its decision the Tribunal has had recourse to Section 10 of the Interpretation Act, R.S.O. 1980, Chapter 219, which reads as follows:

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that

the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

It is our understanding that the rule of stare decisis does not apply as rigidly (if at all) to the decisions of an administrative tribunal as it does to those of a court of law; although, of course, equity will normally best be served by equality or uniformity. The option to radically vary or actually reverse its own previous position, as established by a line of decisions, is therefore open to the Tribunal which certainly ought not, if it thinks it right, be inhibited from doing so.

The words which seem to offer the most interesting prospect of useful re-examination are to be found at s.1.(o)(ii) of the aforementioned Regulation 726 under the Ontario New Home Warranties Plan Act, viz., "major structural defect" means "...any defect in workmanship or materials...that materially and adversely affects the use of such building for the purpose for which it was intended..."

We refer in particular to the words "that materially and adversely affects the use of such building for the purpose for which it was intended..."

The Tribunal has held in the past that such a defect must so affect the use of the whole of the building, not just a part of it, that it must render the whole building uninhabitable or virtually so. In one case, the owner-occupant of a new home was so overwhelmed by the defect complained of that she was obliged to move out and take quarters in a hotel and put her dogs in a boarding kennel. In another case where there was only one bathroom which had defects which the local public health inspector called dangerous and unsafe for the bathing of the baby, a "major structural defect" was found to exist although such would not have been the case had there been a second bathroom to provide alternative means of bathing the baby.

But is this interpretation necessarily accurate? In the present case, the basement walls (which, of course, are load-bearing and are a load-bearing portion of the building) have a leak due to a crack so that the basement is damp and wet. Can this effect be deemed to materially affect the "use of the building" for its intended purpose in an adverse way?

In its past decisions, the Tribunal has interpreted the word "use" in a unitary sense, by regarding a building constructed as a domicile to possess only a single use, i.e., habitation. We now ask the question: Can "use" also mean "uses," i.e., may a house be "usable" in one or in many of its parts, but not "usable" as a whole? In this case, the Tribunal is disposed to say "yes".

Therefore the Tribunal has decided to allow this claim for the reasons stated.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claim and to rectify the problems complained of which the Tribunal deems to be a "major structural defect" forthwith.

MR. AND MRS. C. LUSTHOUSE

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, VICE-CHAIRMAN, PRESIDING  
DR. STUART E. ROSENBERG, MEMBER  
D.H. MACFARLANE, MEMBER

APPEARANCES:

MICHAEL TITLE, representing the  
Ontario New Home Warranty Program

No one appearing for the Applicants

DATE OF  
HEARING: 24 June 1986 Toronto

REASONS FOR DECISION AND ORDER

It is now 10:05 a.m. and the Applicants have not  
appeared.

Section 7 of the Statutory Powers Procedure Act  
provides that:

Where notice of a hearing has been  
given to a party to any proceedings in  
accordance with this Act and the party  
does not attend at the hearing, the  
tribunal may proceed in his absence and  
he is not entitled to any further notice  
in the proceedings.

The claimants were properly served with the  
Appointment for and Notice of Adjourned Hearing as may be  
seen by Exhibit 5, which is the Affidavit of Service sworn  
the 19th of June, 1986.

As the claimants have not appeared, no evidence has  
been placed before the Tribunal in support of their claim.  
Under the circumstances, it is unnecessary to hear from the  
Corporation. There being no evidence to support the claim  
before the Tribunal, the Tribunal directs the Program to  
disallow the claim pursuant to the authority vested in it  
under Section 7 of the Statutory Powers Procedure Act and  
Section 16(3) of the Ontario New Home Warranties Plan Act.

MEADOWHILL HOMES LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
D.H. MacFARLANE, MEMBER

APPEARANCES:

MICHAEL TITLE, representing the Registrar under  
the Ontario New Home Warranties Plan Act

No one appearing on behalf of the Applicant

DATE OF

HEARING: 17 April 1986

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Meadowhill Homes Limited, had requested a hearing after receiving a Notice of Proposal dated October 21, 1985, under section 9 of the Ontario New Home Warranties Plan Act from the Registrar of the Program to revoke its registration under the Plan.

No one appeared on behalf of the Applicant at the opening of the proceedings which were delayed for fifteen minutes and thereafter recessed for another fifteen minutes. The Tribunal being satisfied that the Notice of Hearing had been properly served on the Applicant and on William Moskalyk, an officer of the company, thereupon proceeded with the hearing in the absence of the Applicant.

The issue between the parties was the failure of the Applicant to rectify defects and deficiencies in accordance with a Conciliation Report rendered by the Program dated March 21, 1985. The Applicant had been advised of a complaint of a new home owner and was informed of the inspection date. No one representing the Applicant appeared at the inspection. The Applicant was notified of the repairs required to be made but did not respond. The Warranty Program subsequently called for tenders and was obliged to pay the owner \$1,310.00 to have the repairs made. An invoice for the repairs, and an administrative fee of the Program, was sent to the Applicant in the amount of \$1,506.50. This amount has not been paid.

The Tribunal finds on the evidence that the Warranty Program had made reasonable efforts to advise the Applicant of its position; that the Program's letters to the Applicant were both received and ignored.

The Tribunal finds that the steps taken by the Program to remedy the problems complained of were reasonable and were justified in the circumstances, and that the sum of \$1,506.50 was reasonably and properly expended. The Tribunal also finds that the Warranty Program is justified in looking to the Applicant for repayment to the Plan of this sum.

Therefore by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal to revoke the registration of Meadowhill Homes Limited.



J. MUSCAT

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
LOUIS A. RICE, MEMBER

APPEARANCES:

J. MUSCAT, appearing on his own behalf

CAROL STREET, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 14 April 1986

Toronto

# REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program dated May 1, 1985 wherein the Program concluded that the squeaks in the floor and the two minor humps on the first and second floor of the house, owned by the Applicant, were the result of drying out of materials and minor shrinkage of materials and were not considered to be major structural defects as defined in the Regulations.

The evidence before this Tribunal is that in 1982 some remedial work was done with respect to the squeaks in the left rear bedroom floor, front entrance hallway floor and the kitchen entrance floor. These repairs were acknowledged by the Applicant as having been done and a release was signed by him. Subsequently in 1985, a further complaint was made about squeaky floors throughout the first floor of the house and two humps, one at the threshold of the family room and one immediately above, at the threshold of the bedroom.

It was the evidence of one of the inspectors of the Program that there was some loose subflooring on the first floor and loose bridging, but in his opinion neither defect constituted a major structural defect as defined. The humps were described as not being excessive and not causing any safety hazard.

The evidence of the claimant was that there were people living in the home at the present time and the house was being used as a residence.

The Tribunal finds that the squeaks in the floor and the two humps in the floor are caused partly by inadequate nailing of the floor and general shrinkage of materials. The lack of humidity has perhaps contributed to the latter effect; however, the Tribunal cannot find, given the definition of a major structural defect, that the problems complained of constitute a major defect in that they neither affect the load-bearing portion of the building nor materially and adversely affect the use of the building.

Consequently, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim of the Applicant.

NORHOME DEVELOPMENTS INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE REGISTRATION

TRIBUNAL    STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
             KENNETH VAN HAMME, MEMBER  
             LOUIS A. RICE, MEMBER

APPEARANCES:

GREGORY C. HERTZBERGER, representing the Applicant

CAROL STREET, representing the Registrar under  
the Ontario New Home Warranties Plan Act

DATE OF

HEARING:    11 April 1986

Toronto

#### REASONS FOR DECISION AND ORDER

This is an appeal by Norhome Developments Inc., from a Proposal of the Registrar, Ontario New Home Warranty Program, dated January 26, 1986, wherein he proposed to refuse the Company's application for registration under the Ontario New Home Warranties Plan Act. The Registrar's reasons relate in part to the conduct and capabilities of Norhome itself and in part to the past conduct and capabilities of its President, John R. Newton.

No witnesses were called by either party to this hearing but a Statement of Agreed Facts (Exhibit 7) was filed, as was a document entitled "Appellant's Exhibit Record" (Exhibit 10). According to these exhibits, Mr. Newton was the principal officer of Safari Developments Ltd. Safari was full registered as a builder under the Plan from April 5, 1977 to April 5, 1980 when its registration expired. The Program was obliged to pay \$38,677.96 for warranted repairs to some 33 houses built and sold by Safari during that period. These monies have never been reimbursed to the Program notwithstanding that indemnification is a term and condition of registration (O.Reg. 728, s.1, para.4).

Given the past history of Safari and Mr. Newton, the Registrar, as a condition of registration of Norhome required:

- a) A cash payment of \$20,000.00 up front. This will be considered as the first instalment of the over \$38,000.00 owed to the Program.
- b) Security in the amount of \$20,000.00 (i.e. \$1,000.00 per unit) based on the number of units proposed for the up coming twelve months. This is security normally required of all registrants who have had a history of claims experience with the Program.
- c) After the first year of registration, fifty percent of the security will be refunded and the remaining fifty percent will be retained and put towards the balance of money due to the Program.
- d) After the first year of registration, the matter will be reviewed and a decision will be made with respect to the remaining \$8,000.00.

As the conditions relating to Safari's indebtedness to the Program were unacceptable to Norhome, the Registrar refused registration citing, with reference to Norhome, lack of financial responsibility, especially the failure to post security and the failure to reimburse the Program for Safari's obligations, and with reference to Mr. Newton, that his past conduct afforded reasonable grounds for belief that Norhome's undertakings would not be carried out in accordance with law and with integrity and honesty. The Registrar also claimed, again given the past record of Safari and Mr. Newton, that there was not sufficient technical competence in the applicant Norhome to perform the warranties.

Under the Ontario New Home Warranties Plan Act, a person is entitled to registration unless any one of the conditions, set out in Section 7(1) of the Act apply. The subsection reads, in part, as follows:

7. (1) An applicant is entitled to registration by the Registrar except where,

. . . . .

- (c) the applicant is a corporation and,
  - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or
  - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty; or
- (d) in the case of an application for registration as a builder, the applicant does not have sufficient technical competence to consistently perform the warranties.

To protect the public trust, the legislation requires the Registrar to look behind the corporate veil and it is clear under these provisions that in the case of a corporation, the past conduct of its officers and directors may be taken into account in determining whether to grant registration.

The Tribunal does not know when Norhome was incorporated. However, letters found in Exhibit 10 dated December 17, 1979, and February 20, 1980, indicate that it was in existence then. The letter from HUDAC of February 1980 to Norhome speaks of a \$50,000 bond to be posted on behalf of Norhome as a condition of registration. It also refers to the indebtedness of Safari and states:

If those claims are not settled with the Warranty Program the registration of Safari will be revoked and that in turn will reflect on the application of Norhome, both companies have the same John R. Newton as sole principal.

There is no evidence that Norhome was involved in any builder activity in the intervening period.

The Tribunal was told by counsel for Norhome that Norhome is prepared to post security but not to repay Safari's debt to the Program. Aside from the fact that Norhome has refused to pay Safari's debt, little evidence was provided as to its financial capabilities. An unaudited interim balance sheet found in Exhibit 10 shows retained earnings as of September 30, 1985 of \$37,373. A letter from a bank account manager dated September 30, 1985 states in part as follows:

We presently have established a low 6-figure line of credit for the Company, and we consider Mr. Newton to be a responsible businessman and capable of meeting his commitments.

On the basis of this evidence alone, the Tribunal would have difficulty in concluding that Norhome could not reasonably be expected to be financially responsible in the conduct of its undertakings. However, the past conduct of its officers must also be taken into account.

The principal officer and shareholder of the two companies was and is John R. Newton. It is John R. Newton with whom we are primarily concerned in this decision rather than the corporate veils in which he may appear.

There was no suggestion that Mr. Newton was not the principal officer and directing force of Safari, nor is there any dispute that the Program was obliged to pay some \$38,700 for warranted repairs to houses built by Safari and that this debt has not been repaid. Counsel for Norhome pleaded extenuating circumstances for this state of affairs. The explanation submitted by him was that in mid-October, 1979, the Canadian Imperial Bank of Commerce "took over" Safari and, therefore, neither Safari nor Mr. Newton could complete the houses and necessary repairs or carry out its undertakings or reimburse the Program. He submitted that because they could not act, they should not now be held responsible.

This explanation, in the Tribunal's opinion, overlooks several facts. The "take-over", if it could be categorized as such, only related to houses being constructed in the Terrace Bay, Ontario project. The claims paid by the Program related to houses constructed in several other towns and cities in Northern Ontario.



To fully appreciate the situation, the Program provided a detailed summary of the claims made against the Program arising out of the construction activity of Safari. The summary reveals that of the 33 claims listed, only seven were in connection with houses built in Terrace Bay. Twenty-four claims were made with respect to houses purchased or occupied by the owners prior to October 16 or 19, 1979. In one case, purchase or possession of the house took place on August 15, 1977 with the date of claim, December 8, 1977 and the date of inspection by the Program, October 20, 1978.

The Tribunal also notes, however, that of the 33 claims, only nine were formally made before mid-October 1979. Of the nine houses completed after October 16, 1979, six were in Terrace Bay and, therefore, were likely completed under the terms of agreement outlined in the Bank's letter of October 19, 1979, that is under the direction of a consulting engineer paid by Kimberly-Clark. These six claims account for some \$15,000. The remaining Terrace Bay house where the owner took possession in September 1979 had claims for warranted repairs in excess of \$10,700. Undoubtedly by the fall of 1979, Safari was in severe financial difficulty, and it was not about to spend any of its own funds, if it had any, to make any repairs to houses it had built earlier.

No one argued that there is a legal obligation on either Norhome or Mr. Newton personally to indemnify the Program on behalf of Safari. But, as the Tribunal understands the argument of counsel for the Registrar, the failure to indemnify the Program with respect to the Safari claims shows a lack of integrity on the part of Mr. Newton. As counsel put it, Mr. Newton just "chose to walk away" from the corporate obligations. It is this past conduct of Mr. Newton to which the Registrar points in support of his Proposal.

Counsel for Norhome on the other hand submitted that since there was no legal obligation on the part of Norhome or Mr. Newton to indemnify the Program, then there can be no lack of integrity on the part of Mr. Newton if he chose not to do so.

On the matter of lack of technical competence, again counsel for the Registrar points to the history of claims and argues that Mr. Newton, as the directing force behind Safari must be held responsible for the numerous breaches of warranty that occurred prior to October 16, 1979, and shortly thereafter. In reply, Norhome's counsel submits that the

iciencies resulting in claims against the Program were for the most part minor in nature and that no builder builds a perfect house. He questioned how, if indeed there is a lack of technical competence, which he denied, the repayment of all or part of the \$38,000 to the Program could overcome this problem.

The Tribunal finds that most of the houses which had innumerable defects were constructed only under the supervision of Safari and Mr. Newton, and that in several cases, Safari and its President had ample time before the bank "take-over" such as it was, to correct any defects in these houses. In other words, in the Tribunal's opinion, the intervention of the Bank in October, 1979, does not provide a blanket excuse to Safari and Mr. Newton for all of the construction deficiencies and for failure to discharge their undertakings to the Program. As earlier noted, Norhome was put on notice in early 1980, that unless the claims related to Safari were settled, the Registrar would take that into account in considering any application by Norhome for registration because of the common principal shareholder John Newton. There was no evidence presented to the Tribunal, even in the intervening years, steps were taken by either Safari or Mr. Newton to discharge the outstanding claims in whole or in part.

The Act distinguishes between "law" and "integrity" and requires both elements. "Integrity" is not defined in the Act. The Shorter Oxford English Dictionary defines it as:

1. The condition of having no part or element wanting; 2. unimpaired or uncorrupted states; original perfect condition;
- 3.b. Soundness of moral principle; the character of uncorrupted virtue; uprightness, honesty, sincerity.

The Tribunal finds that during 1979 and 1980, when it was ascertained that Safari was in financial difficulty, Mr. Newton, principal officer and directing force of Safari did not conduct himself with integrity with respect to Safari's undertakings, and that the Registrar was not in error in concluding that the past conduct of Mr. Newton afforded reasonable grounds for belief that Norhome's undertakings would not be carried on in accordance with law and with integrity and honesty.

The Tribunal agrees with counsel for Norhome that not every house is constructed "perfectly". It is precisely because a "perfect" house may not be constructed that the Warranty Program was established and provision was made under the Act that if the defects were warrantable, the builder in the first instance, or the Program would rectify the matters. If the Program pays for the repairs, it is incumbent upon the builder by the terms and conditions of registration that the builder indemnify the Program for these costs. The Tribunal finds that the large number of claims against Safari, even though some were of a minor nature, indicates that under Mr. Newton's control and directions, Norhome does not have sufficient technical competence consistently to perform the warranties under the Act.

Accordingly and by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the applicant's registration under the Plan.

The Tribunal directs the applicant's attention to Section 10 of the Act which reads as follows:

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

REGENCY HOMES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
D.H. MacFARLANE, MEMBER

APPEARANCES:

B.N. MIDANIK, representing the Applicant

BRIAN CAMPBELL, representing the Registrar under the  
Ontario New Home Warranties Plan Act

DATE OF

HEARING: 24 February 1986

Toronto

# REASONS FOR DECISION AND ORDER

This is an appeal by Regency Homes Inc., a Corporation registered under the Ontario New Home Warranties Plan Act from a Notice of Proposal of the Registrar, wherein the Registrar proposes to refuse to renew the Corporation's registration. As required by section 9 of the Act, the Registrar in the Notice of Proposal dated March 21, 1985, listed in detail the numerous, and if proven, very serious incidents showing a record of breaches of the Act, which in his opinion, afforded reasonable grounds for belief that the Corporation, Regency Homes Inc. and its officers and directors, Joe Fishman and Ike Katz would not carry out the corporate undertakings in accordance with law and with integrity and honesty.

No witnesses were called by either party to this hearing. However, at the commencement of the hearing, a statement of Facts was filed as Exhibit 7. The facts in this statement, although not agreed to by counsel for Regency Homes Inc., were not disputed by him. The Tribunal therefore takes these facts as proven. The facts show that Regency Homes Inc. has had a long history of failure to comply with the provisions of the Ontario New Homes Warranties Plan Act and the regulations thereto, and they clearly support all the allegations contained in the Registrar's Notice of Proposal.

At the present time Regency Homes Inc. owes some \$52,000 to the Ontario New Home Warranty Program; monies that have been paid out by the Program as a result of non-compliance with the Act by Regency. Mr. Midanik, counsel for the Regency Homes Inc. did not argue any extenuating circumstances. He conceded that Regency Homes Inc. has defaulted on its undertakings to the Ontario New Home Warranty Program. He also made it quite clear that he could not give any assurance to the Program or to this Tribunal that Regency Homes Inc. would be in a position to repay the Program. He advised the Tribunal that Regency now has some seven houses under various stages of construction which are being built for specific purchasers. He asked the Tribunal to allow Regency to remain a registered builder for a further period of six months to permit these houses to be completed. He argued that confirmation of the Proposal of the Registrar would result in a failure to complete the houses which in turn would result in further claims upon the Program.

Counsel for the Ontario New Home Warranty Program told the Tribunal that the Program was aware of the consequences of refusing to renew the registration, but given the history of Regency Homes Inc., it would be better to terminate the building activities of that Company now.

The Tribunal has reviewed the Proposal and the facts contained in Exhibit 7 and has considered the submissions of both counsel and must agree with the Registrar that the past conduct of Regency Homes Inc. and its officers and directors affords reasonable grounds for belief that the Company's undertakings will not be carried out in accordance with law and with integrity and honesty as required by section 7 of the Act.

Therefore by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal to refuse to renew the registration of Regency Homes Inc.

R. AND MRS. CHARLES R. STUART

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

RIBUNAL: STEPHANIE J. WYCHOWANEC Q.C., CHAIRMAN, PRESIDING  
F. THOMAS PEOTTO, MEMBER  
D.H. MACFARLANE, MEMBER

PEARANCES:

MR. AND MRS. CHARLES R. STUART,  
appearing on their own behalf

CAROL STREET, representing the  
Ontario New Home Warranty Program

DATES OF

HEARING: 27 January 1986

Toronto

#### REASONS FOR DECISION AND ORDER

The facts leading to this claim are as follows. In August 1980, the Applicants purchased a new home from the Cadillac Fairview Corporation. In late December 1984, three major leaks originated high on the basement walls which affected the use of the recreation room in the basement. One of the leaks appeared to be behind the fuse box. By March, 1985, there were an additional 7 leaks on all 4 walls of the basement. One leak was around the electric conduit leading into the fuse box and it was this leak which caused the Applicants the greatest concern because of the potential safety hazard. The remaining leaks were apparently from the rod holes in the basement walls. From the evidence there appeared to have been no cracks in the basement walls other than the leaks. When the leak around the electric conduit was noted, the Applicants apparently telephoned the Ontario New Home Warranty Program, and not being satisfied with the response, contacted a contractor about the problem. The Applicants attempted to divert the water around the electrical conduit leak and because of their concern, retained a contractor to repair all the leaks. These repairs were carried out immediately in March without the prior approval and authorization of the Program. Inspection by the Program did not occur until April 22, 1985, after the repair work had been completed.



The Applicants now claim the sum of \$3,548.00 which is the cost of the repair work done plus interest on that amount. The Applicants' claim was denied by the Ontario New Home Warranty Program on the basis that the leaks do not constitute a major structural defect and did not materially affect the use of the building.

To succeed before this Tribunal, the Applicants must establish the existence of a major structural defect as defined in the Regulations to the statute.

There is no dispute that there were leaks in the basement and that there was some water damage sustained to the walls. The Tribunal does not doubt that the Applicants were very much concerned about the potential safety hazard. However, the issue before the Tribunal is whether the warranty provided by the statute is available to the Applicants in these circumstances. Upon reading the Act and the Regulations and the many decisions of this Tribunal, including the Peirpoint decision referred to it by counsel for the Program, and while the Tribunal is sympathetic to the Applicants, it must come to the decision that the leaks were not sufficient to affect the load bearing portion of the building nor did they adversely affect the use of such building as a whole for the purpose for which it was intended.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

ANTHONY BOLAHOOD

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REFUSE TO GRANT REGISTRATION

RIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
BARBARA J. SHAND, MEMBER  
M. JEAN WORMLEY, MEMBER

PEARANCES:

ANTHONY A. BOLAHOOD, appearing on his own behalf

STEPHEN A. AUSTIN, representing the Registrar under  
the Real Estate and Business Brokers Act

ATE OF  
EARING: 30 April 1986

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Anthony Bolahood appeals the Proposal of the Registrar of Real Estate and Business Brokers to refuse his registration as a real estate salesperson. The reason given for refusing to grant registration was that in the opinion of the Registrar, the past conduct of the applicant afforded reasonable grounds for belief that he could not carry on business in accordance with law and with integrity and honesty. The basis of this opinion was that Mr. Bolahood had been involved in a real estate transaction while not being registered as a real estate salesman contrary to the provisions of the Real Estate and Business Brokers Act.

Several witnesses were called by the Registrar. Mr. Bolahood represented himself.

During the period February 1979 to December 1982, Mr. Bolahood had been registered as a real estate salesman. Hereafter, having allowed his registration to lapse, he became and was at the material time, the Property Manager of a condominium building at 55 William Street East in Oshawa and apparently owned some 30 units in that building.

In mid-August, 1985, he was approached by some personal acquaintances - the Yeomans, who wished to purchase a condominium unit in the William Street building. At that time, Mr. Bolahood had 3 units of his own for sale which he showed to the Yeomans. He was aware, through a newspaper advertisement, of another unit in the building which was for sale under an exclusive listing agreement with Metcalf Realty Associates and the Yeomans wanted to see that unit as well. According to Mr. Bolahood, he telephoned the Metcalf offices, identified himself by giving his name, and obtained permission from a secretary to show the listed premises which he proceeded to do. According to the testimony of Mrs. McIsaac, one of the vendors, she assumed that Mr. Bolahood was from the Metcalf office.

As it turned out, the Yeomans preferred the McIsaac property over those owned by Mr. Bolahood. It is at this point that Mr. Bolahood showed faulty judgement. Rather than immediately referring the Yeoman's to the listing broker, he approached the vendors to tell them that he had an offer for their unit. Such approach by a person not registered under the Act is contrary to section 3 of the Act.

At the time that Mr. Bolahood came to the vendors, a salesman from the Metcalf firm was already at the premises with another offer. Mr. Bolahood left and evidently called the Metcalf offices again. According to the testimony of Mrs. Hartwig, a saleswoman with the Metcalf firm, Mr. Bolahood said he was a real estate salesman and asked if he could co-broke the McIsaac property as he had an offer. Mrs. Hartwig told him that because there was an outstanding offer, Mr. Bolahood would have to wait. Evidently that same day, there was a similiar discussion with Mr. Metcalf as well. The Metcalf office checked Mr. Bolahood's credentials and found that Mr. Bolahood was not registered as a real estate salesman as he had claimed to be.

At some point during the evening of the same day, as Mr. Bolahood put it, "it fizzed on me at the time that I didn't have the authority to sell the property". He then asked the Yeomans to leave the offer for a day. The following morning, Mr. Bolahood went to the real estate offices of Canada Permanent Trust and asked to be taken on as a salesman "to make the deal back to the norm".

Mr. Bolahood explained the situation of the offer to the Manager at Canada Permanent, and the Manager agreed to co-broke the sale with Metcalf in the name of Canada Permanent. Metcalf agreed to this arrangement and the Yeoman offer was then presented to the vendors and accepted. Meanwhile, an application was made through the Canada Permanent office for the registration of Mr. Bolahood as a salesman in that office because although Mr. Bolahood had told the Manager that he had a registration in transit, the Manager was certain that Mr. Bolahood was not registered at the time.

Several days later, Mr. Metcalf wrote to the Registrar to complain of Mr. Bolahood's conduct and subsequently the Registrar refused the registration of Mr. Bolahood.

The Tribunal has considered the evidence and finds that in some instances Mr. Bolahood deliberately left an impression that he was a registered real estate salesman and in others, he, in fact, held himself out to be one. The Tribunal notes that he did attempt to put matters right but even in this, he was not totally candid.

The Tribunal also finds that contrary to the Act, Mr. Bolahood attempted to trade in real estate knowing that he was not registered as a salesman.

The Tribunal is of the opinion that in making the decisions that he did and in taking the action that he did, Mr. Bolahood showed a lack of integrity and a disregard for the law. For these reasons, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse Mr. Bolahood's application for registration.

During the course of the hearing, the Registrar stated that he would not consider a further application for registration from Mr. Bolahood for at least one year. The Tribunal does not think that section 10 of the Act contemplates such an arbitrary period. If Mr. Bolahood can satisfy the Registrar that there is new or other evidence, or that clearly the material circumstances have changed, then his application should be considered.

Mr. Bolahood asked the Tribunal to make it a term or condition of its Order that he be exempt from completing the course of study and passing the examinations required by the Registrar. The Tribunal cannot make such an order because section 14(4) of Regulation 891 is mandatory. The subsection reads as follows:

(4) Where a person has previously been registered and he has surrendered or has had his registration terminated and more than three years have elapsed since such surrender or termination, prior to again being registered, he shall complete the course or courses of study approved by the Registrar and pass the written examination or examinations approved by the Registrar.

Even if the Tribunal had the jurisdiction to exempt Mr. Bolahood from this requirement, it would not do so in the circumstances of this case.

HAROLD BRAY REAL ESTATE COMPANY LIMITED and  
HAROLD I. BRAY

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO RENEW THE REGISTRATIONS

TRIBUNAL: MATTHEW SHEARD, Q.C. VICE-CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
M. JEAN WORMLEY, MEMBER

APPEARANCES:

A.N. MAJAINA, representing the Registrar under the  
Real Estate and Business Brokers Act

No one appearing for the Applicant

DATE OF  
HEARING: 4, 5 November, 1985

Toronto

# REASONS FOR DECISION AND ORDER

The Applicant requested this hearing by way of an appeal from the Proposal of the Registrar of Real Estate and Business Brokers to revoke his registration as a registered real estate broker (as well as that of his Company) but he failed to show up, although duly served with an Appointment For and Notice of Adjourned Hearing, either in person or by counsel. The proceedings therefore went forward in his absence.

The facts were both straightforward and distasteful. Mr. Bray had held registration for many years, since April 30, 1962. In 1983 he was employed by a group of developers operating as an Ontario company to find tenants for their shopping plaza project. They already had two or three major commercial tenants and required the usual sort of diverse mercantile tenancies to complete the impression of universal variety for their project which is found to attract the public, e.g., a restaurant, a barber shop, a beauty salon, perhaps a paint shop, a cheese shop, specialty clothing shops, etc. He set up a sort of on-site office in a trailer and divided his time between that location and his offices in Brampton, where he carried on a long established business.



The system whereby the desired tenants were found was something like this. Advertisements, including a sign on the building site of the new shopping plaza, solicited enquiries from prospective tenants. Mr. Bray would determine what was the nature of the business carried on by the prospective tenants. If, for example, the prospective tenant was a donut vendor and his principals wanted a donut shop in the plaza, then he was meant to get the prospect to submit an offer to lease in writing accompanied by a cheque payable to his firm to secure the offer, and later cover Bray's broking commission. The lessor-developers would either accept or reject the offer depending upon whether they either wanted or needed the proposed tenancy. If the offer was rejected the deposit was refundable by Mr. Bray to the rejected offeror in the usual way.

Apparently Mr. Bray, whom we gather from the evidence was growing somewhat advanced in age with a severe drinking problem, perceived an opportunity to dishonestly exploit this system to his advantage. It seems that he accepted deposits, accompanied by offers to lease, from a number of prospective tenants whose mercantile operations, (e.g. a beauty salon and a proposed tearoom) were either already covered by completed leases or else not desired by the developers on their roster of services to be available at the plaza. These deposits he apparently converted to his own use while failing to communicate the offers to the developers. When pressed by the offerors for the return of their deposits, he put them off with a variety of excuses. For example, one lady, who had given him a substantial sum as a deposit on a proposed lease of space for a tearoom operation, was told that her deposit had been spent on architect's drawings. This was an untruth and the lady wrote him accusing him of perpetrating a "cheap swindle". At all events, Mr. Bray was caught by the police, charged, convicted under the Criminal Code, and imprisoned.

It remains only to express the disapproval of the Tribunal and to disallow this appeal from the Registrar's Proposal to revoke registration, a proposal which, on the evidence and in the circumstances, seems the only possible disposition of this matter.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal and refuse to renew the registrations of Harold Bray Real Estate Limited and Harold Bray as registered real estate brokers.

R. C. DOWNIE

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
OF REAL ESTATE AND BUSINESS BROKERS

TO SUSPEND REGISTRATION

UNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN, PRESIDING  
F. THOMAS PEOTTO, MEMBER  
DWIGHT LANDON, MEMBER

ARANCES:

JEHUDA J. KAMINER, representing the Applicant

STEPHEN MARTIN, representing the Registrar of  
Real Estate and Business Brokers

S OF

ING: 25, 26 February 1986

Kingston

REASONS FOR DECISION AND ORDER

This is an appeal by Edgar C. Downie who has been  
stered as a Real Estate salesman since 1974, pursuant to  
Real Estate and Business Brokers Act, R.S.O. 1980,  
ter 431, hereinafter referred to as The Act, from a  
posal of the Registrar of the said Act dated April 9,  
5. The Registrar proposes to suspend the registration of  
Applicant for a term of six months forthwith. The  
posal is based almost entirely on allegations made by the  
ies to a real estate transaction in the summer of 1983 as  
the circumstances of that real estate transaction and Mr.  
ie's conduct.

In brief, the Registrar cites in his Notice of  
posal the following scenario and course of conduct by Mr.  
ie:

- (1) Mr. and Mrs. Gwynne-Timothy were the joint  
owners of a real estate property at 400  
Roosevelt Drive, Kingston, Ontario,  
hereinafter referred to as the Roosevelt  
property.
- (2) In July of 1983 the Gwynne-Timothys  
contacted Campeau Realty Ltd. of Kingston,  
Ontario, and made them aware of their  
interest to relocate near Cataraqui Golf

Club in that City. Shortly after, Ralph Valentine, who was a salesman with Campeau Realty, informed the Gwynne-Timothys of a property located at 24 Richfield Place, Kingston, hereinafter referred to as the Richfield property.

- (3) The Gwynne-Timothys made an offer to purchase the Richfield property at \$100,000.00 conditional upon the sale of the Roosevelt property. The Roosevelt property was listed exclusively with Campeau Realty with an expressed understanding that the selling price less commission would be not less than \$85,000.00, or \$89,000.00 asking price.
- (4) On July 29, 1983, Ralph Valentine, who had obtained the exclusive listing of the Roosevelt property, on behalf of Campeau Realty, introduced prospective buyers to the Roosevelt property and to Mrs. Gwynne-Timothy. Mrs. Gwynne-Timothy was unaware of their identity but these people appeared extremely enthusiastic as to the property.
- (5) On July 30, 1983, Edgar C. Downie, as a registered salesman of Pratt & Murray Realty Ltd., negotiated co-brokering arrangements with Mary Campeau, the president of Campeau Realty, as Edgar C. Downie represented to Mary Campeau that he had prospective purchasers who might well be interested in the Roosevelt property. On that day, the Applicant attended at the Roosevelt property and met Mrs. Gwynne-Timothy who was in the property. The Applicant indicated to her he was inspecting the property on behalf of prospective purchasers from Kingston and, after a short inspection, he left indicating to her that this was just about what his clients desired to purchase.
- (6) Later that same day, Mary Campeau and the Applicant presented a written Offer to the Gwynne-Timothys by purchasers of the name of "Hachey and Pouliot" for \$83,000.00.

- (7) The Gwynne-Timothys submitted a Counter-Offer for \$88,500.00 and a printed term numbered 8, hereinafter referred to as the "term numbered 8" appearing in the Agreement of Purchase and Sale as amended by Mary Campeau by the insertion of the word "Not" between the words "acknowledge" and "having inspected", was initialled by the Gwynne-Timothys, with the result that the term read as follows:
- "8. Purchaser acknowledges 'not' having inspected the property prior to submitting this Offer and understands that upon Vendor accepting this Offer there shall be a binding Agreement of Purchase and Sale between Purchaser and Vendor."
- (8) On August 1, 1983, the prospective Purchaser countered with a purchase price of \$86,500.00. After considerable deliberations, the Gwynne-Timothys decided to sell the property for \$86,500.00 with a reduced total commission of only \$3,000.00.
- (9) On August 2, 1983, Ralph Valentine and the Applicant Edgar C. Downie presented a new Offer for \$86,500.00. The term numbered 8 was marked identically by Mary Campeau to read as it had read as altered by the Gwynne-Timothys. When Ralph Valentine delivered an executed copy of the Agreement to the Gwynne-Timothys he indicated that "Hachey and Pouliot" were one and the same as the persons who had first viewed the property with him on July 29, 1983.
- (10) The Gwynne-Timothys communicated their concern with events to Mary Campeau. Basically, they felt that the non-disclosure by the Applicant of the identity of the Purchasers prevented them, or may have prevented them, from obtaining the best possible sale price for their property.
- (11) The Gwynne-Timothys did instruct their solicitor to close the transaction but to hold the balance due of the real estate commission in his trust account.

- (12) Subsequently, Pratt & Murray Ltd. successfully sued the Gwynne-Timothys for the balance owing of the real estate commission, receiving a Judgment in its favour from the District Court of Ontario at Kingston on September 9, 1985.
- (13) The Gwynne-Timothys contacted the Kingston Ontario Real Estate Association and made their demands known. The Association decided on behalf of the Applicant and of Ralph Valentine that no charges be laid. The Ethics Committee, however, did express its concern that the Applicant had permitted an incorrect and misleading statement in the Offer in question.
- (14) Upon learning that the Real Estate Association would not take action, the Gwynne-Timothys disclosed the foregoing to the Registrar.

After reviewing the aforementioned information, and obtaining copies of the written explanations from Mary Campeau, Edgar C. Downie and Ralph Valentine to the Kingston Ontario Real Estate Association, the Registrar formed the conclusion that the Applicant should have his registration suspended for a term of six months for the reason that the foregoing conduct affords reasonable grounds for belief that the Applicant would not carry on business in accordance with law and with integrity and honesty. Edgar C. Downie was the agent of the Gwynne-Timothys and he had, as agent, a duty to disclose all pertinent facts. He failed to disclose all pertinent facts and, in particular, encouraged an incorrect and misleading statement in an Offer. He deceived his principals whereas he had a duty at all times to protect their interest. In summary, the Registrar believes that because of Downie's deception, the Gwynne-Timothys were not permitted to bargain to the best of their ability, or in the alternative, their bargaining position, or capacity, was weakened considerably by Downie's deception.

The Registrar called Robert Gwynne-Timothy, Ralph Valentine, Mary Campeau, and himself to testify on behalf of the Ministry. Mr. Coleclough, the Registrar, reiterated his concern about Edgar Downie's conduct. The Registrar testified that the Applicant must have rationalized that he was actually acting on behalf of the Purchasers and this

ttitude slipped into a deception of the Vendors. The applicant was acting, in law, on behalf of the Vendors and he clearly failed to protect their interests, and, in fact, mislead them to possibly defeat their best interests. The Registrar testified that he was very concerned that the Act, which is basically an Act of public protection, be perceived to be effective as to its purpose. The Registrar also testified that there was an unfortunate "confusion" in the perception of many in the real estate industry as to whether the Purchaser or Vendor was the client.

The Applicant testified on his own behalf. It was clear from his testimony, and that of his employer on his behalf, that he was both a successful and experienced agent. It was also apparent from the Registrar's testimony that there had been no previous complaints as to Edgar C. Downie's conduct as a real estate agent, from the time of his registration in January of 1974.

After reviewing all the testimony, the Tribunal is of the opinion that, to coin a term used by the Registrar in his Proposal, the explanation of events given by Mr. Downie is "tortured". The Tribunal can come to only one conclusion that he, as agent for the Gwynne-Timothys, purposefully, not inadvertently, mislead them as to the identity of the purchasers of their property during the submission of the offers. He withheld information in order to advance his own interest or that of the Purchaser whereas his duty lay to the Gwynne-Timothys, to advance their best interests. It is not relevant consideration that the Gwynne-Timothys may not have suffered a financial loss as a result of the course of events. On this particular point, the Tribunal reaches no conclusion.

The Tribunal agrees with the Registrar that any failure to disclose to a principal by a registered real estate agent must be viewed as serious misconduct.

Accordingly, in the circumstances, and bearing in mind the otherwise unblemished record of the Applicant, the Tribunal, pursuant to the authority vested in it subject to section 9(4) directs the Registrar to refrain from carrying out his Proposal to suspend the registration of the Applicant for a period of six months to the extent that the foregoing period be reduced from six months to one month and the suspension commence forthwith.



FOCUS REALTY LIMITED and  
VLADIMIR BAOTIC

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REVOKE THE REGISTRATIONS

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
BARBARA J. SHAND, MEMBER  
JOHN W. PATERSON, MEMBER

APPEARANCES:

ROCCO A. GRILLI, representing the Applicants

JOHN BURTON, representing the  
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 12 November 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a Proposal of the Registrar of Real Estate and Business Brokers made under Section 9(1) of the Real Estate and Business Brokers Act to revoke the registration of Focus Realty Limited and Vladimir Baotic, both registered brokers. Mr. Baotic is the sole shareholder, director and officer of the Corporation and has been since November, 1981.

In the Notice of Proposal, the Registrar cited thirty-seven instances whereby moneys paid in trust to Focus were improperly disbursed contrary to Section 20(1) of the Act. All these violations occurred over a ten month period in 1985. In addition, the Registrar alleged that Focus, acting through Mr. Baotic and Mr. Baotic personally, did furnish false, misleading or deceptive information when he failed to disclose two longstanding judgments, one against himself, and the other against himself and Focus jointly, when he applied for renewal of registration in 1983 and again in 1985.

These allegations were admitted by counsel for Mr. Baotic and Focus. Two witnesses were called on behalf of Mr. Baotic, essentially as character witnesses. Mr. Baotic did not testify.

Mr. Grilli argued on behalf of his clients, that in reaching its decision, the Tribunal should take into account number of mitigating factors. According to Mr. Grilli, the financial difficulties of Focus and Mr. Baotic arose because the bank had refused to grant a line of credit. Without this, Mr. Baotic was forced to use trust funds to pay his operating expenses and his salespersons. (It is to be noted that Mr. Baotic evidently did not use the trust funds for his own personal gain). Apparently the bank now has provided some sort of arrangement which allows the operating expenses of the business to be paid as they arise. Mr. Grilli submitted that, given this development and the general improvement in Mr. Baotic's financial position, it is unlikely that further tampering with trust funds will occur in the future. As for the outstanding judgments, he said that arrangements were being made to retire the personal judgment and that there was a dispute, yet to be resolved, over who was actually responsible for paying the other judgment. Mr. Grilli pointed out that the books and records of the business were complete and that no member of the public had suffered a loss as a result of Mr. Baotic's actions.

Mr. Baotic, we are told, is 39, married, with four children. He has taken a number of steps to improve his position in life. The record shows that he has been in the real estate industry since November 1974. There is no evidence of any previous complaints or misdemeanors under the Real Estate and Business Brokers Act. As far as the Tribunal is aware, there is no previous criminal record or bankruptcy or either registrant. The character witnesses gave evidence of Mr. Baotic's generally good reputation in his own community and in the real estate industry in Hamilton.

The business premises are rented under a lease which expires in 1990 with an option to renew for a further five years. Leasehold improvements costing some \$25,000 have been made to the premises. The firm employs some 19 salespersons, most on a part time basis.

Mr. Grilli, in a very able argument, asked that Mr. Baotic be given a second chance. He urged the Tribunal to impose a penalty less harsh than revocation of registration. He suggested that Mr. Baotic personally be allowed to continue as a real estate broker, but under the supervision of another broker who would oversee the trust account for a

period of two or three years. Alternatively, he proposed that Mr. Baotic's registration be that of a salesman, because as such, he would not have access to trust funds.

In the past, the Tribunal has taken a very serious view of both infractions under the Real Estate and Business Brokers Act, and does so now.

In his application for renewal of registration, Mr. Baotic in 1983 and again in 1985 reported that there were no outstanding judgments against him. This was patently false and misleading. The same false information was contained in the application to renew the corporate registration.

As the Tribunal understands the facts, the personal judgment against Mr. Baotic arose out of a student loan made to him in 1974. It is now well over a decade since that debt was incurred, and it is only now that some effort is being made to retire it. This course of conduct does not show integrity on the part of Mr. Baotic. The second judgment against Focus and Mr. Baotic appears to have been signed shortly after the corporate application for renewal had been made in 1985. Certainly the writ of execution was filed after both 1985 applications had been made.

The breaches of Section 20(1) of the Act are even more serious. Mr. Baotic appears to think that it is all right to use trust funds for business purposes so long as the trust funds are eventually returned to the proper persons. He also appears to have imparted this belief or attitude to at least one of his former salespersons. This is simply not the case. There is no excuse whatsoever for improperly disbursing or using trust funds. In this case, the misuse of trust funds was not an isolated event, out of character, but a standard practice, for an extended period of time. The Tribunal agrees with the Registrar that Mr. Baotic's conduct, and through him, the conduct of Focus was such as to afford reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Tribunal was urged to impose a lesser penalty on Mr. Baotic. We have considered the alternatives proposed by Mr. Grilli, but have concluded that neither is appropriate in the circumstances.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to revoke the registrations of both Focus Realty Limited and Vladimir Baotic.

The Tribunal reminds Mr. Baotic of Section 10 of the Real Estate and Business Brokers Act which states that, "A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed".

R.S. HARMER REAL ESTATE LTD. and  
RONALD S. HARMER

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REVOKE THE REGISTRATIONS

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
M. JEAN WORMLEY, MEMBER

APPEARANCES:  
WILLIAM HOWARD HAMILTON, representing the Applicants  
STEPHEN P. MARTIN, representing the  
Registrar of Real Estate and Business Brokers

DATE OF  
HEARING: 18, 19 November 1986 Toronto

# REASONS FOR DECISION AND ORDER

This is an appeal from a Notice of Proposal issued by the Registrar, Real Estate and Business Brokers Act, wherein he proposed to revoke the registrations of R.S. Harmer Real Estate Ltd. (hereinafter referred to as the "Company") and Ronald S. Harmer. It is the Registrar's opinion that the past conduct of both the Company and Mr. Harmer affords reasonable grounds for belief that their business will not be carried on in accordance with law and with integrity and honesty. The conduct complained of is an error in a listing of lake front property with a cottage. This error was brought to the attention of the Registrar by the purchasers of the property who allege that they relied on the information contained in the listing to their detriment.

The property in question is an irregular lot in Rama Township fronting on Lake Couchiching. The property was initially listed by Don Grieg, a salesman in the Company's employ, in April, 1981. The lot size was described in the Listing Agreement as "50 x 120 (irr)". On the Listing Agreement in bold print is the notice that "All measurements are approximate." This listing expired prior to the property being sold. In February, 1983, the property was re-listed with the Company. Mr. Harmer himself is shown as the salesperson on the listing. The lot size on this listing

is shown as "F.50' Rd 100' Depth 150' app". The same dimensions were used in a later Listing Agreement dated October, 1983. Mr. Harmer was again shown as the salesperson on the agreement. The property was eventually sold from this listing to Mr. and Mrs. Robert Aitken in November 1983. The Agreement of Purchase and Sale describes the property as "having a frontage of 50' more or less by a depth of 150' more or less". The description of the lot in the deed and the survey attached to the deed shows a lake frontage of "40 feet more or less" at the high water mark.

Mr. Aitken said that he was unaware of the discrepancy until some time after the transaction was completed. He said he only became aware of the narrower lake frontage when he received a Notice of Assessment from Rama Township sometime in early 1984. He then took steps against his solicitor for not bringing the matter to his attention prior to completing the purchase and against Mr. Harmer and the Company. When Mr. Harmer became aware of the problem, he referred the matter to his insurance adjusters. In due course, the adjusters informed Mr. Aitken's new solicitor that they "failed to see any liability on the part of our insured and also do not appreciate that there could be any damages whatsoever".

Several months later Mr. Aitken complained to the Registrar about the conduct of the Company and Mrs. Irene Lee, the salesperson with the Company, who actually introduced the property to Mr. Aitken. Following an investigation by the Registrar's office and a meeting with Mr. Harmer, the Notice of Proposal was issued.

In the Notice the Registrar alleges that Mr. Aitken relied to his detriment on representations and assurances made by the Company and Mr. Harmer; that Mr. Harmer admitted that the error in the second listing was due to his own neglect in relying on dimensions contained in a previous listing; and that Mr. Aitken had not been compensated "or otherwise had his complaint resolved by Harmer or the Company". At the hearing, the Registrar testified that it was his position that the public must rely on the expertise and integrity of real estate brokers with whom it deals, and that Mr. Harmer had not taken reasonable care in preparing the listing, thus placing the public at risk. It was his conclusion that having regard to all the circumstances, the registration of both the Company and Mr. Harmer should be revoked.



Mr. Harmer said that he used the lot measurements from the 1981 listing. This may or may not be the case since the measurements in 1983 differ from those used in the earlier listing. There was no explanation given for this difference. Mr. Harmer also said that he had asked the vendors for a deed or survey so that the actual measurements could be ascertained, but that he had never received these documents.

The Tribunal has weighed the evidence carefully. The regrettable error in itself does not constitute a breach of the Real Estate and Business Brokers Act. Whether Mr. Harmer and/or the Company would have been liable for damages in a civil action is a moot point. It is also immaterial to the Tribunal's deliberations whether Mr. Aitken, an apparently knowledgeable buyer of real estate, relied to his detriment on the representations as to the width of the frontage - Mr. Aitken said that he had "stepped off" the frontage and had thought it was less than 50 feet, but had not asked for a measurement to be taken. The issue for the Tribunal to decide based on the evidence before it is whether the Registrar's Proposal is reasonable. The Tribunal is of the opinion that it is not.

The evidence before the Tribunal is that, aside from this one error, Mr. Harmer and the Company have had an unblemished record in the real estate field.

It is the Tribunal's opinion that in relying either on a previous listing or the verbal assurance of the vendor, Mr. Harmer was lax, if not negligent, and in fact placed potential purchasers at risk. The Tribunal agrees with the Registrar that members of the public are entitled to rely on the facts conveyed to them when a purchase of real estate is contemplated. There is an onus on the real estate broker or salesperson to take reasonable and careful steps to ensure that the information that is being imparted is correct.

Had no further action been taken by Mr. Harmer, after being informed of the error, the Tribunal would be inclined to be quite severe with Mr. Harmer and the Company. However, and apparently unknown to the Registrar when he made his Proposal, Mr. Harmer had instituted a practice in his offices which will significantly reduce if not entirely eliminate, any further errors of the kind complained of in this case. Mr. Harmer has now obtained the services of a professional title searcher who makes a subsearch in the Registry office of all property listed by the Company or Mr. Harmer. The subsearch provides the correct measurements of

the property and details of any mortgages or other encumbrances. The subsearches are made daily before the listings are made available to his salespersons and other real estate brokers. Mr. Harmer also asked the Orillia and District Real Estate Board to institute this practice throughout the area, however, the suggestion was turned down. These steps taken by Mr. Harmer are commendable.

There appears to have been some misunderstanding initially as to the amount of restitution or compensation which would have satisfied Mr. Aitken. When Mr. Harmer was aware that the sum was \$2,000, he paid it.

In taking these actions promptly and voluntarily, Mr. Harmer, and through him, the Company, has shown that both will likely act in compliance with Section 6(1)(b) of the Act in the future. Therefore, revocation of registration would be an unduly harsh penalty. Given all the considerations, the Tribunal is of the opinion that a suspension of fourteen days duration against Mr. Harmer is appropriate. The Tribunal expresses the hope that, assuming there are no future breaches of the Act, this suspension of Mr. Harmer will not negatively affect any application for renewal of registration of him personally or of the Company.

At the commencement of this hearing, counsel for the two Applicants argued that the Registrar was without jurisdiction to make a Proposal in the particular circumstances of this case. At that time, the Tribunal reserved its decision on this motion. It is the Tribunal's opinion that the Registrar did have the authority to proceed with the Proposal.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar not to carry out the Proposal against R.S. Harmer Real Estate Ltd. or Ronald S. Harmer but to suspend the registration of Ronald S. Harmer for a period of fourteen days commencing December 17th, 1986.

WILHELM HAURENHERM

APPEAL FROM A PROPOSAL OF  
THE REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
JOHN W. PATERSON, MEMBER

APPEARANCES:  
WILHELM HAURENHERM, appearing on his own behalf  
A.N. MAJAINA, representing the Registrar under the  
Real Estate and Business Brokers Act

DATES OF  
HEARING: 20 and 21 January 1986 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a Proposal of the Registrar of Real Estate and Business Brokers to revoke the registration of Wilhelm Haurenherm as a registered real estate salesman.

The Proposal is supported by two basic allegations of the Registrar, namely, that in connection with the sale of some 28 homes in a new subdivision, Haurenherm acted throughout as a real estate broker and not as a salesman and that in applying for a renewal of registration as a salesman, Haurenherm falsely omitted to disclose "the full true and material particulars" in connection with his activities in selling the new homes.

The main witness called on behalf of the Registrar was William Cardle, a registered real estate broker. Mr. Haurenherm, not represented by counsel, gave evidence on his own behalf.

The evidence of Cardle in many instances was flatly contradicted by Haurenherm, however certain basic facts were not denied.

Wilhelm Haurenherm has been registered as a salesperson under the Real Estate and Business Brokers Act continuously from July 13, 1967 to the present and during this period has been employed by numerous real estate brokers.

Sometime in 1979 Haurenherm reached an agreement or understanding with the principals of Reixach Brothers Company Limited, a developer and builder of new homes in a subdivision known as Goldberry Square to sell these houses on the Company's behalf. Apparently neither the Company nor the principals were prepared to officially "list" the properties for sale. The agreement was personal to Haurenherm. His broker/employer at that time, Century 21 Adelman Limited, had no contact with the developer.

In September 1979, Mr. Haurenherm joined Bill Cardle Real Estate Limited, also a registered broker, as a salesman. The circumstances of the first meeting between Messrs. Cardle and Haurenherm and the agreement as to the terms and conditions of employment are in dispute. According to the records of the Ministry of Consumer and Commercial Relations, Haurenherm remained a registered salesman with Bill Cardle Real Estate Limited from September 19th, 1979 to June 19th, 1981.

During this period Haurenherm appears to have been primarily, but not exclusively, occupied in promoting and selling the houses in the Goldberry Square. Haurenherm was assisted in this activity initially by Edgar Humphrey, another registered salesman and later by Eric Hemmer who was registered as a real estate broker under the name of E. Hemmer Real Estate Limited. Apparently Cardle personally had virtually nothing to do with the sales of these houses. However, there were "For Sale" signs bearing the Cardle name and some Offers to Purchase for these houses were typed and processed through the Cardle office.

Mr. Haurenherm was successful in selling these houses. As each house was sold, Reixach paid a commission directly to Haurenherm. From the proceeds of the commission, Haurenherm paid some monies to Humphrey and later to Hemmer, and some operating expenses associated with the Goldberry Square project such as the telephone bills and rental for the on-site trailer. The balance of the money paid to Haurenherm by Reixach was retained by Haurenherm for his own use. Haurenherm paid no money to Cardle in relation to these sales.

By accepting his commission directly from Reixach, Haurenherm acted in contravention of Section 30 of the Real Estate and Business Brokers Act which reads as follows:

No salesman shall trade in real estate on behalf of any broker other than the broker who, according to the records of the Registrar, is his employer, and no salesman is entitled to or shall accept any commission or other remuneration for trading in real estate from any person except the broker who is registered as his employer. (emphasis added)

According to Cardle's evidence, Haurenherm, after using the Cardle office to have Offers of Purchase and Sale drawn up on two occasions, suggested to Cardle that he, Haurenherm, become a salesman in his office. Haurenherm had an interesting proposition. He would concentrate on selling the houses in the Goldberry Square development and Cardle would be responsible for listing and selling any backup properties related to the purchase of the new houses. In either case, the resulting commission would be split 70% to Haurenherm and 30% to Cardle. The reason given for this division of activity was that Cardle was experienced in selling resale homes in the neighborhood while Haurenherm was experienced in selling homes in new subdivisions. Humphrey, who had worked for the same real estate broker as Haurenherm, would also be working at the subdivision site and according to Cardle, Haurenherm suggested that Humphrey should join the Cardle firm as well. Cardle agreed to all of the terms on the basis of a "handshake" agreement and both salesmen joined Bill Cardle Real Estate Limited.

This version is flatly denied by Haurenherm. According to his testimony, it was Humphrey who first approached Cardle and outlined the working arrangement. Haurenherm later met with Cardle and "verified" with him what Humphrey had already outlined. Haurenherm said that Cardle wanted nothing to do with the sale of the subdivision homes and did not want any commission from the sale of those homes. The latter apparently was primarily interested in the backup sales and agreed to a 75% - 25% commission split with respect to these homes, the 75% share going to Haurenherm even though Cardle was listing and showing these houses himself. Haurenherm also said that he never suggested that Humphrey should join the firm since that had been worked out with Humphrey beforehand.

In the face of such contradiction, the Tribunal can only assume that either there was no meeting of minds between Cardle and Haurenherm, or that one or other is not telling the truth.



Whatever the agreement, Haurenherm began selling the houses in the subdivision along with Humphrey and then Eric Hemmer and Cardle began selling the backup properties. Some commission was paid to Haurenherm by Cardle from these latter sales; no commission was paid to Cardle personally or to the firm with respect to the Goldberry Square sales. This situation continued until virtually all the houses in the subdivision had been sold. Cardle said that he had been told by Haurenherm that no commission was to be recovered by anyone until all the houses in the subdivision had been sold. Cardle was aware in a vague sort of way that houses were being sold in the subdivision because some Offers were being typed in his office and "sold" stickers were being posted for the houses that had been sold in the subdivision which he evidently visited from time to time.

Cardle stated that he did not know that commissions were being paid directly by Reixach to Haurenherm. As a result of a conversation with Hemmer and when only 4 unsold houses remained in the subdivision, Cardle asked for his share of the commission. At that time, according to Cardle, he was told by Haurenherm that no commission was owing to him because all that Cardle was entitled to under their arrangement was the commission on the sale of the backup properties.

However, Haurenherm was prepared to give Cardle \$200 for each unsold house, as they were sold to cover the cost of typing the offers, etc. It is not clear to the Tribunal whether Cardle received these payments, although Cardle admitted that he retained \$200 from some commission that was due and payable by him to Haurenherm.

Haurenherm's version of these events again differs significantly from that of Cardle. Haurenherm insists that throughout the period, Cardle knew houses were being sold and that commission was being paid directly to Haurenherm by the Reixach Company but that Cardle had never asked for a share of such commission. Haurenherm only agreed to give Cardle \$200 because Cardle complained that business outside the subdivision was slow and his office was incurring operating costs in processing the offers related to the development. These payments were never considered by Haurenherm as commission.



The testimony of the two main witnesses differed in one other major respect. According to Haurenherm, after Eric Hemmer had joined him in the subdivision, Hemmer told Haurenherm that the arrangement with respect to the commission payable by Reixach was improper. Haurenherm said this was the first time that the propriety of the arrangement was raised, and he therefore discussed it with Cardle. Cardle is reputed as saying that since there were only some 4 houses left to be sold, the arrangement should continue as it had in the past, and it did.

Cardle's version is different. He states that the problem discussed was how to pay commission to Hemmer with regard to the backup properties since Hemmer was a licensed broker. It was decided that Hemmer would be shown as a co-broker on those listings thus entitling him to a portion of the commission on the backup sales only. According to Cardle, there was no discussion about the propriety of the commission being paid directly by Reixach to Haurenherm for the sale of the new houses except to the extent that Hemmer told Cardle that it was being paid as each house was sold. Cardle stated that it was this information which prompted him to ask for his share of the commission on the subdivision houses.

In June 1981, apparently after all the houses in the Goldberry Square development had been sold, Haurenherm joined another real estate firm, again as a salesman. Cardle took no action with respect to the commission allegedly owed to him by Haurenherm and by Reixach. It was not until 1983 that Cardle reported the Goldberry Square transactions to the Registrar for Real Estate and Business Brokers.

Haurenherm insists that he never held himself out as a real estate broker or as self-employed while working in the subdivision and that throughout the period September 1979 to June 1981, he was an employee of Cardle as a salesman. He also swore that he believed that even though the arrangement with Cardle, as he understood it, was unusual, it did not contravene the Real Estate and Business Brokers Act because it had the approval of Cardle who was his employer and a registered real estate broker. He was dissuaded, he said, from putting things right when he found out that the method of operation was improper by Cardle himself, who thought it best to carry out the remaining sales under the agreed to arrangement.

It is regrettable that neither Humphrey nor Hemmer was available to give evidence which might have assisted the Tribunal in its deliberations.

All four registrants, involved directly or indirectly in the Goldberry Square sales, were experienced in the real estate business and knew or should have known the requirements of the Act governing their industry.

Whatever the motives and whatever the understanding between and among the parties, the fact remains that the provisions of the Real Estate and Business Brokers Act were breached, not just by Haurenherm, but by all of the registrants involved who chose to go along with the arrangement. From the evidence now before the Tribunal, it appears that all four registrants were ready to turn a blind eye to the requirements of the Act to take advantage of an opportunity and an arrangement where all personally benefited to some degree. It is indeed fortunate that no member of the public was injured by their actions and their disregard of the requirements of the Act.

However, the only applicant before the Tribunal is Haurenherm. In weighing and assessing the evidence, the Tribunal has come to the conclusion that Haurenherm saw an opportunity to advance his own financial interests and he entered into an arrangement with the builder which he knew or ought to have known was wrong and contrary to the Act. The Tribunal also believes that Haurenherm could not have carried on business in the manner that he did without the passive concurrence and in some cases, active participation of his colleagues in the venture.

A person should not be lightly deprived of his means of gaining a livelihood. The events leading to the complaint now before the Registrar took place several years ago. The Tribunal is not aware of any other complaints against the applicant. The complained of actions of the Applicant, while showing a lack of integrity on his part, have not resulted in any fraud against the public. Whether there was a fraud against his former employer is in dispute and not an issue before this Tribunal. The Tribunal has no reason to believe that the past conduct of Haurenherm affords reasonable grounds for belief that he will not carry on business in the future as a real estate salesman in accordance with law and with integrity and honesty.

The evidence relating to Haurenherm's financial position was inconclusive. The Tribunal has no evidence before it to support the finding that the activities being carried on by Haurenherm now will result in contravention of the Act or Regulations.

Further, on the evidence before it, the Tribunal does not find that Haurenherm acted as a real estate broker within the meaning of the Real Estate and Business Brokers Act, nor did he falsely complete the renewal application.

Nevertheless, the Tribunal cannot overlook the fact that Haurenherm contravened the Act in the past as previously noted and a sanction is necessary by way of warning to the industry at large that such wrongdoing will not be tolerated.

The Tribunal has power to substitute its opinion for that of the Registrar. The issue now is whether it should do so. The evidence given under oath to the Tribunal which was not available to the Registrar leads it to the conclusion that it should.

Therefore by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to refrain from carrying out his Proposal to revoke Haurenherm's registration but instead to suspend the same for a period of four months commencing March 1st, 1986. At the end of the suspension period of four months, Haurenherm may apply for registration as a real estate salesman, and provided the Registrar is satisfied that Haurenherm has taken the current mandatory Introduction to Real Estate courses now required to be taken by all persons prior to initial registration as a real estate salesperson and successfully passed the required exams related thereto, the Registrar will grant registration to him. \*

\* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Registrar of Real Estate and Business Brokers. The appeal had not been concluded at the time of this publication.

VID W. JOHNSTON

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION

IBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
M. JEAN WORMLEY, MEMBER

PEARANCES:

B.P.R. EBY, representing the Applicant

STEPHEN P. MARTIN, representing the  
Registrar of Real Estate and Business Brokers

TE OF

ARING: 30, 31 October 1986

Toronto

# REASONS FOR DECISION AND ORDER

The events leading up to the Registrar's Proposal under the Real Estate and Business Brokers Act to revoke the registration of David W. Johnston can be said to have begun in August, 1981, when a major bank decided to promote and transfer a young Manager from Kitchener to Toronto. Mr. Legere, the young man in question, was reluctant to come to Toronto for a number of reasons, but it was made clear to him by his superiors that if he wished to continue his very successful career with the bank, he had no choice.

The Legeres, although not familiar with the Toronto real estate housing market, decided that they would buy a house instead of renting accommodation. To assist in the search for a new home, several realtors offered their services to Mr. Legere and his wife, however, initially they only dealt with two salespersons, one from Canada Trust, a Mary Boudreau, the other, Ruth Griffith from Royal Trust. Ms. Boudreau showed the Legeres several houses, but according to Mr. Legere, they were all too expensive. In the following week, she again showed several other houses, but although they were cheaper, they were not acceptable to the Legeres. During this period, Mr. Legere was living in an expensive hotel in Toronto at his employer's expense and it appears that some pressure was being put on him to get fully settled as quickly as possible.

Mr. Legere, therefore, began looking for property on his own. Ms. Boudreau had earlier shown him a house at 87 Meadowvale Road in Scarborough, which had been listed for sale by Royal Trust on a multiple listing basis. The Legeres liked the house but thought that, at \$175,000, it was too expensive, in fact, overpriced. According to Mr. Legere, Ms. Boudreau had suggested presenting an offer at \$165,000, which was well above Mr. Legere's self-imposed limit of \$157,000.

By the fourth week, the Legeres were tired of looking so they reconsidered the Meadowvale property. By this time, according to Mr. Legere, he had lost confidence in Ms. Boudreau because she did not appear to be generally knowledgeable, could not answer several questions about the Meadowvale property, and apparently was unwilling or unable to find the answers elsewhere. Nevertheless, Mr. Legere instructed her to prepare an offer on the Meadowvale house for \$151,000 and to forward it to him in Kitchener for further consideration. This was done.

It is now necessary to pick up another thread of what eventually turned out to be a very tangled web. While Mr. Legere was still posted in Kitchener, he met and became quite friendly with a man many years his senior who had been in the real estate business for many decades. This man was David W. Johnston, the Applicant in this hearing. Although working in Toronto, Mr. Legere travelled back to Kitchener from time to time because he still had unfinished business there. He told Mr. Johnston of his difficulties in finding a suitable house. It is not clear whether Mr. Legere asked Mr. Johnston to do some checking for him or whether Mr. Johnston offered to help on his own. What is clear is that Mr. Johnston did go to Toronto on more than one occasion and did check out the Meadowvale property and the surrounding area, as well as other properties.

The exact sequence of events thereafter is not clear from the evidence. We know that Ms. Boudreau drew up an offer for \$151,000 and that later that offer was amended by Mr. Legere by striking out the name of Canada Trust and inserting Mr. Johnston's name as selling agent. We also know that Mr. Legere told Ms. Boudreau that he had no further use of her services and that he was prepared to give her \$500 for past efforts, which she refused.

According to Mr. Legere, he discussed the Boudreau offer with Mr. Johnston and had told him of his problems with the selling price. Mr. Legere did not think the offer at



\$151,000 would be accepted by the vendors and he felt there was little point in presenting it. He said that Mr. Johnston told him that he, Johnston, would present the offer and that he could get the house at about \$157,000 which was the maximum price that Mr. Legere was prepared to pay. Mr. Legere also testified that Mr. Johnston had assured him that if the vendors insisted on a higher price, Mr. Johnston would be flexible on his commission so that all the Legeres would actually pay for the house would be \$157,000. Mr. Legere said he expected to get some money back from Mr. Johnston if he had to pay more for the house initially. On this basis, Mr. Legere decided to go with Mr. Johnston.

Mr. Legere said that, although he had some reservations, he changed the name of the selling agent on the offer at the direction of Mr. Johnston and after consulting with two solicitors as to the legality of this action. The offer was submitted at \$151,000, returned at \$169,000 and finally countersigned at \$159,000. Mr. Legere said that at no time did Mr. Johnston see the original or amended offer. When the offer was countersigned at \$159,000 without consultation with Mr. Johnston, he, Legere, personally got in touch with Ms. Griffith, the salesperson at Royal Trust to tell her that that was the final offer. The offer was accepted at this price and in due course, the purchase was completed.

Mr. Johnston's recollection of many of these events is markedly different. He testified that he had scouted the housing market in and around Toronto, looking for a house for the Legeres in the \$120,000 range close to the GO Train. He said that he could not find anything in that price range that met the stated needs of Mr. Legere. He was told of the Meadowvale property and he again came to Toronto to make inquiries about that house in particular and about the price of houses being constructed nearby which evidently were in the \$200,000 range. After he returned to Kitchener, he told Mr. Legere that if he liked the Meadowvale property, Mr. Legere would make an offer at a price he thought reasonable given all the circumstances. He did not tell Mr. Legere what price would be suitable.

It was at this time that Mr. Legere told Mr. Johnston that he already had asked Ms. Boudreau to prepare the offer at \$151,000, but that he was not satisfied with Ms. Boudreau and did not expect that the offer would be accepted. The issue of traffic flow and possible street widening was raised, and Mr. Johnston went back to Toronto to get that information. By then, according to Mr. Johnston, it was his third or fourth



trip to Toronto, and he said he was reluctant to spend any more time on Mr. Legere's needs. When he reported back to Mr. Legere, he was told that Ms. Boudreau had been discharged and he was asked to act as Legere's agent.

Before doing anything further, Mr. Johnston said he first spoke with Ms. Griffith to see if there were any objections to his acting on the sale since he did not belong to the Metropolitan Toronto Multiple Listing Service. After being assured that there would be no problems, he was ready to draw up a new offer. When he telephoned Mr. Legere to tell him this, he found that the Boudreau offer had been amended and already sent to Ms. Griffith for presentation to the vendors.

Mr. Johnston emphatically denied that commission was ever discussed with Mr. Legere, let alone any arrangement whereby part of the commission might be turned back to Mr. Legere.

In due course, Ms. Griffith advised Mr. Johnston that the offer had been accepted and Mr. Johnston then waited for his commission.

Some time after the purchase had been completed, Mr. Johnston, after many inquiries, was told that the commission to which he felt entitled, having persuaded Mr. Legere to proceed with the offer, had been paid to Canada Trust and presumably Ms. Boudreau. He then commenced an action against Royal Trust for its recovery. Royal Trust joined Canada Trust which in turn added Mr. Legere as the Fourth Party to the action, alleging that Mr. Legere had 'conspired' with Mr. Johnston to deprive Canada Trust of the commission due and owing to it.

When Mr. Legere was served with the Fourth Party Notice, he was horrified. Canada Trust had already complained directly to his employer about his 'business ethics' and he did not want any further problems. He consulted with his lawyer and was advised to defend the action. However, Mr. Legere first telephoned Mr. Johnston to find out what was going on. According to Mr. Legere's testimony, Mr. Johnston told him that he, Johnston, was only trying to scare the defendant, that the action would not go to trial, and that Legere would not be involved. Mr. Legere said that from this conversation, he expected that if a settlement was reached, Mr. Johnston would protect him since he was Johnston's client. Based on these assurances, Mr. Legere decided not to defend the action. Mr. Legere said that he couldn't believe that a court could rule against him on the merits. Nevertheless a judgment for some

\$5,500 was obtained against him. When he was threatened with garnishment proceedings, Mr. Legere paid \$3,000 to Canada Trust and then asked Mr. Johnston for some money back. Mr. Johnston refused.

Mr. Legere was very upset about the whole transaction. He described his feelings as "going through two or three years of misery". He felt embarrassed and that he had been 'shafted'. He felt that he, a purchaser, had ended up paying Mr. Johnston's commission. He then complained to the Ministry about Mr. Johnston's actions. These complaints are the basis for the Registrar's Proposal to revoke the registration.

Mr. Johnston's version of the events surrounding his legal action against Royal Trust is different. He told the Tribunal that after he failed to receive his commission, he sued Royal Trust for it. He said that Mr. Legere called him after he had been served with the Fourth Party Notice and had asked Mr. Johnston to withdraw his action. Mr. Johnston refused to do this and he advised Mr. Legere not to ignore the Fourth Party Notice but to attend to it. Mr. Johnston denied that he said or did anything which could have lulled Mr. Legere into taking no action on the Notice.

Mr. Johnston said that his claim never went to trial because, on the advice of his solicitor, he reluctantly settled for \$2,000. The possible effect on Mr. Legere of this settlement was not considered. According to Mr. Johnston, he is reluctant to settle out of court because he felt that a settlement would reflect badly on his reputation, however, he would not continue incurring legal expenses to pursue his claim.

The Registrar, after receiving Mr. Legere's complaint and after meeting with Mr. Johnston issued his Proposal. In the Proposal, the Registrar stated that Mr. Legere "relied to his detriment on the advice and assurances given to him by Johnston". The Registrar also stated that he believed that the Legeres were not allowed, because of Johnston's assurances, to properly defend themselves". Although the Registrar took into account that Legere ought to have defended his action against him, the Registrar did not think that this error excused the conduct of Mr. Johnston. It was the Registrar's conclusion that the past conduct of Mr. Johnston in this matter afforded reasonable grounds for belief that Mr. Johnston would not carry on business in accordance with law and with integrity and honesty, within the meaning and contemplation of Section 6(1)(b) of the Real Estate and Business Brokers Act.

When questioned, Mr. Cook, the Assistant-Registrar, said that the reason the Proposal was issued was that a dispute over commission had, as he put it, "overflowed to the public". It was his position, as the Tribunal understands it, that Mr. Legere's interests should have been better protected by his agent, Mr. Johnston, that Mr. Johnston had guided Mr. Legere incorrectly, and that by allowing his own case to proceed, Mr. Johnston failed to look after his client. The Registrar does not rely on any one incident to support his conclusion, but on the cumulative effect of all of Mr. Johnston's alleged actions in what was described as a "not straight forward real estate transaction".

There are three separate incidents which have attracted the Registrar's notice. The first relates to the issue of "flexibility" on commission. The evidence on this issue was contradictory. Mr. Legere testified that he understood that he would get back half the commission payable to Mr. Johnston if the purchase price of the house was over \$157,000. Mr. Johnston denies that commission was discussed at all. The main reference to commission in the Exhibits is in Exhibit 9, which was prepared by Ms. Boudreau, wherein she states that Mr. Legere had told her that a real estate broker was going to present the offer for nothing and that he, Mr. Legere was going to save \$4,500, and in Exhibit 10, which is in essence Mr. Legere's response through his employer to Ms. Boudreau's complaint, wherein it states that Johnston indicated a willingness to negotiate a portion of his commission. This Exhibit speaks of \$500 to \$1,000. To say the least, Mr. Legere's understanding of the commission issue has not been consistent. The Tribunal, having weighed the testimony of both Mr. Legere and Mr. Johnston believes that there may have been some discussion between them about commission, but that Mr. Legere either misunderstood the discussion or that his recollection of the discussion is not clear.

The second incident relates to the changes made to the offer wherein Mr. Legere substituted Mr. Johnston's name for that of Canada Trust. The alleged inducement to change agents is the commission pay back promise. The Tribunal, as already stated, does not believe that Mr. Johnston had agreed to return all or part of his commission to Mr. Legere if he was the agent for the latter on the purchase of the Meadowvale property. There is no allegation that the act of changing the agent's name in itself was illegal. Indeed, Mr. Legere appears to have consulted with two lawyers before he did so and he was apparently advised by both that, although it would be better to prepare a new offer, the substitution was acceptable if he wished to change agents.

The third incident relates to the action commenced by Mr. Johnston against Royal Trust. Could or should Mr. Johnston have known that Mr. Legere would be added as a Fourth Party when he commenced the action? Could or should Mr. Johnston have known, that having been joined, Mr. Legere would do nothing to defend the action against him? If the answer to both these questions is 'Yes', is there an absolute onus on Mr. Johnston to protect Mr. Legere in these circumstances, at his own expense, if necessary? In the specific circumstances of this case, the Tribunal believes the answer to the last question must be 'No'.

Mr. Legere sought out the advice of his own solicitor and then chose to ignore it. He chose to do nothing because he could not believe that any court would ever find against him, even if he failed to put in an appearance, and because he says that Mr. Johnston assured him that he would not be involved. The Tribunal has contradictory evidence as to the extent, if any, that assurances were given by Mr. Johnston. The Tribunal believes, however, that the primary or main reason that Mr. Legere declined to take action was his own unshakable belief that no judgment could be signed against him regardless of what happened. He was in no way "not allowed" by Mr. Johnston from defending himself.

The Act does not specifically spell out the duty owed by a real estate broker or salesperson to a purchaser. The Tribunal accepts that implicitly there is a duty on the registrants to advise the purchaser of all the known facts related to a property so that the purchaser can make an informed decision whether to buy or not, and further, not to act knowingly or recklessly to the detriment of a purchaser before, during, or after the purchase of property has been completed. The Tribunal believes there must also be a corresponding duty on the purchaser to act reasonably and responsibly.

The Tribunal agrees entirely with the Registrar that disputes over commission as between real estate salesmen or brokers ought not to overflow to involve the public which, of course, includes the vendor or purchaser involved in the transaction giving rise to the commission.

However, the Tribunal does not think that the duty on the agent extends to prohibit an agent, acting in good faith, from applying to the courts for redress on the off chance that the public may through the actions of another party become involved at some later date. Nor does the Tribunal believe



that there is a duty on the agent to abandon his claim if a member of the public is added as a party to the action by someone else.

Mr. Johnston is 79 years old and semi-retired. He has been involved in the real estate industry for some three decades. There is no record of any impropriety during that period. The Tribunal was impressed with Mr. Johnston's knowledge of the industry and the governing Act. Although not working full time, Mr. Johnston has clearly kept up with developments in the industry and has strong views about some of the practices. In general, the Tribunal was left with the understanding that Mr. Johnston is a proud man who greatly values his independence and reputation in the community and that he would do nothing which might jeopardize either.

The Tribunal has carefully weighed the evidence, and, in this case, has come to the conclusion that Mr. Johnston will not put the public at risk in the future. It has also concluded that his past conduct, which includes the regrettable chain of events surrounding the purchase of the Meadowvale property, is not such as to afford reasonable grounds for belief that in future he will not carry on business in accordance with law and with integrity and honesty.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar not to carry out his Proposal.

By way of obiter dicta, the Tribunal feels compelled to comment on the action of Canada Trust and Ms. Boudreau in particular. As noted earlier, Canada Trust, as a result of the dispute over the commission wrote to Mr. Legere's employer and impeached the former's business ethics. The Tribunal, as stated before, agrees with the Registrar that an argument over commission as between agents should not overlap to the public. In an appalling breach of that principle, Canada Trust complained about a purchaser directly to his employer. The Tribunal has no doubt that this action has caused Mr. Legere irreparable harm. On the information before it, the Tribunal can only form the opinion that this was the deliberate intention of Canada Trust. If this is the case, there is a clear lack of integrity shown on the part of Ms. Boudreau, her supervisor and principle broker. This type of action, whatever the provocation, should be strongly discouraged. The Tribunal has no jurisdiction to require the Registrar to make further investigation into this matter, however, it does recommend to the Registrar, that he review this aspect of the evidence in full in order to satisfy himself that no further action is required.

NICHOLAS MALHAM

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REFUSE REGISTRATION

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR MEMBER  
FREDERICK H. SHERWOOD, MEMBER

APPEARANCES:

LAWRENCE GREENSPON, representing the Applicant

STEPHEN A. AUSTIN, representing the Registrar of  
Real Estate and Business Brokers

DATES OF 19 April 1985  
HEARING: 7 June 1985

Ottawa  
Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Nicholas Malham, has appealed to the Tribunal from a Proposal of the Registrar dated October 19th, 1984, to refuse registration to him as a salesman under the Real Estate and Business Brokers Act, R.S.O., 1980, Chapter 431.

In the Proposal, the Registrar indicated that it was the opinion of the Registrar that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. As to particulars of the conduct, the Registrar alleged that the Applicant had a criminal record for several convictions between the period of January 27, 1981 and January 3, 1982 and would be under probationary supervision until March 3, 1988. The Registrar served the Applicant with a Notice of Further Particulars, dated April 9th, 1985, alleging a way of further particulars that the Applicant furnished false information by failing to provide the Registrar with full particulars concerning his criminal record.

At the hearing, the Ministry led evidence through Sergeant Richard Ralph of the Ottawa Police Department, that was not contradicted by the Applicant, that the Applicant had been found guilty in Provincial Court (Criminal Division) to the following criminal offences:



- (i) January 27, 1981 - keeping a common gaming house, contrary to section 185(1) of the Criminal Code for which he was fined \$300.00 or 14 days incarceration, in default;
- (ii) August 18, 1981 - Break, Enter and Theft, contrary to section 306 of the Criminal Code for which he received a suspended sentence and probation for twelve months;
- (iii) September 1, 1981 - Break, Enter with intent contrary to section 306(1)(a) of the Criminal Code for which he received twelve months incarceration;
- (iv) September 25, 1981 - (a) one count of possession of stolen property, contrary to section 312(1)(a) of the Criminal Code; (b) Harboursing a person While Unlawfully at Large, contrary to section 421(b) of the Criminal Code; for which the applicant was sentenced to three months incarceration on each charge consecutively, and consecutively to the sentence being served.
- (v) September 29, 1981 - Obstructing Justice contrary to section 127(2) of the Criminal Code, for which the applicant was sentenced to a term of thirty days incarceration consecutive to the sentence being served.
- (vi) January 27, 1982 - Conspiracy to commit arson for which the applicant was sentenced to a term of five years incarceration consecutive to the sentence being served.

Sergeant Ralph indicated that the Applicant was co-operative throughout his experience with him, and that he was a personable fellow, a "likeable lad". The Sergeant further added that the Applicant to his knowledge was always involved in the criminal element.

The Registrar of the Real Estate and Business Brokers Act, Alan Coleclough, testified. He indicated that Exhibit 8, filed at the hearing, which was the application for

registration, did not disclose all the offences for which the Applicant had been convicted, in that it omitted the convictions for keeping a common gaming house, one of the counts of Break, Enter and Theft, and the convictions of possession of stolen property. The Registrar testified that he had some concern that the Applicant was attempting to conceal a portion of his criminal record. In summary, however, the Registrar felt, based on the record of conviction of the Applicant, that the registrant was unsuitable whether or not he was attempting to conceal his record and whether or not he had only been convicted of those offences set out in Exhibit 8. The Registrar felt it was very important for a proper administration of the Act that the public perceive only "suitable" people to be registrants. Mr. Coleclough stated that it would be of some concern to the public if a person was admitted to a position of trust after having committed seven serious offences and that person was still on parole.

Mr. Malham testified in his own behalf. He impressed the Tribunal as bright, personable and contrite as to his past behaviour. He indicated that he had gone through a "stupid" period of attempting "to impress everybody and playing the high roller". The Applicant appeared optimistic about the future.

In addition to the Applicant's own testimony, the Tribunal heard testimony from the Applicant's present employer, with whom the Applicant has earned a reasonably lucrative position, that the Applicant has a position of considerable trust in that he personally deals with a large monthly rental deposit for that company. The Tribunal was further informed by a real estate broker, Frank de Franco of De Franco Real Estate Ltd., who has been an agent since 1965, that the Applicant could have a very good future in real estate. Several other business people testified that they would have no reservation in dealing with the Applicant as a real estate salesman, notwithstanding the fact each witness was aware of the Applicant's criminal record. The Applicant also called on his behalf Ward Adams of the John Howard Society, who indicated that he had contacted the Ministry and that the Ministry had indicated to him that a person with the Applicant's criminal record might well be granted registration and that such a record would not afford a refusal per se. It was on the basis of this contact that the Society granted the Applicant funds to enroll in the real estate brokers course in which the Applicant was apparently very successful.

In argument on behalf of the Applicant, it was submitted that non-disclosure was certainly a "red herring" and not a serious contention by the Ministry in that the Applicant

had indicated his inmate number on his application; had indicated the most serious offences for which he had been convicted; and had disclosed an offence for which he had never been convicted.

Secondly, it was argued by counsel for the Applicant that the doctrine of estoppel should be considered in that the Ministry had indicated to the John Howard Society that an Applicant on parole with a record of convictions which included arson would not necessarily be refused registration. It was on this information that the Applicant had enrolled in the real estate course.

The main argument of the Applicant, however, was devoted to the grounds explicitly set out in the original proposal, i.e. that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Counsel argued that the Tribunal should view the past misconduct as a single period in an otherwise law abiding life. Further, that while it was, of course, the Applicant's intention to be honest in all respects, what we should be considering most carefully was whether it was reasonable to assume that the Applicant would carry on business, as distinct from the rest of his life, with honesty. Counsel for the Applicant pointed to Mr. Malham's employment with Controlex since November, 1984, as well as the fact that he had been on parole for thirteen months without difficulty, as evidence to demonstrate the Applicant's intention to carry on his business dealings in the future with honesty.

Although not the main thrust of Mr. Greenspon's submissions, he did suggest to the Tribunal that a refusal to register the Applicant was placing the Applicant in double jeopardy in that he was being punished again for the crimes for which he was previously incarcerated.

Counsel for the Registrar submitted that notwithstanding all the submissions of counsel on behalf of the Applicant that the Tribunal must always bear in mind what the test should be of the proposal before it. Mr. Austin strongly suggested to the Tribunal that the Tribunal should only refuse the proposal if the Registrar is in error - in other words, if the past conduct of the Applicant does not afford reasonable grounds that he will not carry on business in accordance with law and integrity and honesty.

Mr. Austin cautioned the Tribunal against a preoccupation of whether or not the Applicant was reformed. In dealing with the additional particulars of Exhibit 6, counsel for the Registrar suggested it was virtually impossible for the Applicant to have unintentionally omitted three convictions. Counsel therefore suggested that the Registrar had an additional reason to refuse to register respecting the Applicant's intention to mislead.

At the outset, the Tribunal would like to indicate that it finds no intention on the part of the Applicant in omitting three convictions from his application to be registered, to mislead the Registrar. The Applicant clearly indicated the majority of his convictions and the most serious, as well as his inmate number. The Tribunal therefore draws no conclusions from the Applicant's omissions.

Moving on to what must be considered the main ground for the Registrar's refusal, i.e. the Applicant's past conduct, the Tribunal is of the opinion that its consideration is completely circumscribed by the decision of the Divisional Court of the Ontario Court of Appeal, referred to in the Summaries of Decisions, in the appeal by the Registrar of Motor Vehicle Dealers and Salesman concerning the Tribunal's decision to refuse the Registrar's proposal in the case of Re: Richard Brenner Vol. 12 (1983) p.53. In that decision, the Divisional Court stated:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

Looking at all the evidence before us, the Tribunal is of the opinion that the Registrar was not in error. Accordingly and by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his proposal. \*

\*Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by Nicholas Malham. The appeal had not been concluded at the time of this publication.

RAYMOND J. O'DONNELL

APPEAL FROM A PROPOSAL OF  
THE REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN PRESIDING  
KENNETH VAN HAMME, MEMBER  
FREDERICK SHERWOOD, MEMBER

APPEARANCES:  
STEPHEN I. GOLDBERG, representing the Applicant  
STEPHEN A. AUSTIN, representing the Registrar under  
the Real Estate and Business Brokers Act

DATE OF  
HEARING: 11 February 1986 Ottawa

REASONS FOR DECISION AND ORDER

Section 6(1)(b) of the Real Estate and Business Brokers Act, R.S.O. 1980, Chapter 431 reads as follows:

An applicant is entitled to  
registration or renewal of registration  
by the Registrar except where,

....  
(b) the past conduct of the applicant  
affords reasonable grounds for belief  
that he will not carry on business in  
accordance with law and with integrity  
and honesty...

Section 8(1) reads as follows:

Subject to section 9, the Registrar may  
refuse to renew an applicant where in the  
Registrar's opinion the applicant is  
disentitled to registration under section  
6 or 7.

Section 9(4) of the Act reads in part as  
follows:

Where an applicant or registrant  
requires a hearing by the Tribunal...the  
Tribunal...may by order direct the

Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

The issue before the Tribunal in this case has been the suitability of the Applicant for registration as a salesman in the real estate industry.

He comes before us as one who has been stripped of his registration as a salesman in the motor vehicle industry on the basis of a finding of fact contained in a decision of the Tribunal in a previous hearing that he was a person whose past conduct affords reasonable grounds for belief that he will not carry on business with integrity and honesty".

There was no direct evidence that he was a person whose past conduct affords reasonable grounds for belief that he will not carry on business with integrity and honesty". There was no direct evidence that he had spun odometers or even known that odometers were being spun in a dealership conducted by him (nor was there evidence that he didn't). But he ought to have known. The company operated by him pleaded guilty to 10 charges of that offence under the Criminal Code of Canada. He also delegated authority to a person he ought to have known was totally unfit for such delegation thereby putting the public interest at risk. That person was not in possession of registration as required by law. He also left documents signed in blank with that individual in an unlawful manner which also set the public interest at risk and indeed members of the public purchased automobiles whose odometers had been set back and were therefore, in our opinion, harmed, although Mr. O'Donnell insists that they were.

Mr. O'Donnell's wife Trudy is employed as a registered real estate salesperson in a real estate brokerage firm operated by Mr. and Mrs. MacDonald whom we believe to be a fair and reasonable people and whose business we imagine is an excellent one. They have offered Mr. O'Donnell employment and have demonstrated great faith in him as well in his honesty and integrity and also their belief in the likelihood that he will behave properly in the future if registered as a real estate salesman.



The Registrar of Real Estate and Business Brokers does not share the confidence of Mr. and Mrs. MacDonald in him however.

Nor do the members of this Tribunal. Mr. O'Donnell refuses to admit that the events leading to the revocation of his registration as a motor vehicle salesman were the result of anything more than a mistake in judgment on his part at the worst, or than the misdeeds of a person or persons other than himself. But in our view he was grievously at fault in the unhappy circumstances leading to the revocation of his registration as a motor vehicle salesman and his failure to admit or concede this amounts to a possible inability on his part to perceive the difference between right and wrong.

This would, in our view, be potentially very dangerous from the standpoint of public interest were he to be given opportunity to do harm to the public, by either direct or indirect means or by act, omission or commission as a registered real estate salesman. For example, if Mr. O'Donnell perceives that there is nothing wrong in signing contract forms in blank and leaving these with a subordinate when departing upon a trip (a subordinate who was not registered and ought not to have been employed by him in the first place) then we believe his attitude, as well as his past conduct, are not such as to afford reasonable grounds for belief that he will carry on business with integrity and honesty.

We believe that one who has done wrong and admitted his wrongdoing and undertaken to reform himself offers better prospects for the future that the requirements of section 6(1)(b) of the statute will be met, than in the case of one whose attitude reflects no awareness of misconduct in the first instance.

We would not expect anyone to admit guilt or even vicarious fault if he did not believe himself to be at fault. If that failure to admit past fault, however, results from some inability to understand the requirements of law, then we, for our part, are unable to disagree with the conclusions of the Registrar or to direct the overruling of his Proposal.

Therefore by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act the Tribunal directs the Registrar to carry out his Proposal.

THOMAS JOSEPH PEOTTO  
(ALSO KNOWN AS FRANK THOMAS PEOTTO)

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: MARY G. CRITELLI, VICE-CHAIRMAN, PRESIDING  
BARBARA NICHOLS, MEMBER  
FREDERICK SHERWOOD, MEMBER

APPEARANCES:  
STUART B. SCOTT, representing the Applicant  
MICHAEL W. BADER, representing the  
Registrar of Real Estate and Business Brokers

DATE OF  
HEARING: 17, 18 September 1986 Toronto

# REASONS FOR DECISION AND ORDER

This hearing was held pursuant to Section 9(2) of the Real Estate and Business Brokers Act in order to review the Proposal of the Registrar made pursuant to Section 9(1) of that Act to refuse to renew the registration of Thomas Joseph Peotto (also known as Frank Thomas Peotto) as a real estate broker.

Mr. Peotto is 58 years of age and was first registered as a salesman under the Act in 1953. He became a broker in 1957. He was President and shareholder, together with his wife, of Twin Gate Realty Limited, in Thunder Bay, Ontario from 1957 until April, 1983 when that Company's registration under the Act terminated.

Subsequently, he moved to the Toronto area and was a broker with A.E. Lepage Real Estate Services Limited from December 1983 to December 1984 and with Royal Lepage Real Estate Limited from December 1984 to April 1985. From April 1985 to the present, he has been a broker with Humber Valley Realty Ltd.

A lengthy Notice of Proposal was filed by the Registrar, however, many of the reasons set forth therein were abandoned by the Registrar at the commencement of and during the course of the hearing with the result that the Tribunal ultimately had to consider only one reason for the refusal to renew. The Registrar's reason for the Proposal was:

...that the past conduct of the registrant, Peotto, affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, within the meaning and contemplation of section 6(1)(b) of the Act and, by reason thereof, it is the Registrar's opinion that the registrant, Peotto, is disentitled to renewal of registration under the Act.

The Particulars relied upon by the Registrar in support of this reason are that in his application for registration dated August 8th, 1983 (Exhibit 9) Peotto answered "No" to the question: "Are there any unpaid judgments outstanding against you?" In fact, as is now admitted by Mr. Peotto, this answer was false and there were the following five unpaid judgments outstanding against Mr. Peotto and filed with the Sheriff of the District of Thunder Bay as at the date of the said application:

<u>Plaintiffs</u>	<u>Defendants</u>	<u>Damages</u>	<u>Costs</u>	<u>Date Writ Received</u>	<u>Court Writ</u>
Sun Alliance Insurance Company	Twin Gate Realty Ltd. and Frank Peotto	Taxed Costs \$3,738.00 less paid \$506.51 Interest from 2.5 1983 at 11.5%		6.5 1983	Dist 8685
Sun Alliance Insurance Company	Twin Gate Realty Ltd. and Frank Peotto	\$18,101.54 less paid \$2,542.06 Interest from 1.1 1983 at 11.5%		3.5 1983	Dist 8664

<u>Plaintiffs</u>	<u>Defendants</u>	<u>Damages</u>	<u>Costs</u>	<u>Date Writ Received</u>	<u>Court &amp; Writ No.</u>
1 Bank Canada	Twin Gate Realty Limited, Thomas Joseph Peotto, a.k.a. Frank Peotto and West Fort William Credit Union Limited	\$27,137.73 less paid \$3,692.79 Interest at 11.5% from 15.4 1983		15.4 1983	Supreme 8580/83
1 Bank Canada	- " -	\$55,824.59 less paid \$7,616.68	150.32	15.4 1983	Supreme 8579/83
Fort William Credit Union Ltd	Frank Thomas Peotto	\$6,974.99 Interest from 16.3 1982 at 16.5%	91.10	22.3 1982	District 7196/82

While Mr. Peotto now admits that there were outstanding judgments against him as at August 8th, 1983, he denies knowledge of the judgments as at that date and denies any intention to mislead the Registrar.

The evidence of Mr. Peotto was that his Company, Twin Gate Realty Limited, got into serious financial difficulties when that Company purchased a small insurance business in 1982. Sometime thereafter, his wife refused to co-sign a renewal of his bank loan with the Royal Bank of Canada. Mr. Peotto testified that shortly thereafter, he was "shut down" by the Bank and, as indicated above, the status of Twin Gate Realty Limited as a broker was terminated as of April 19th, 1983.

With respect to the first four judgments referred to above, Mr. Peotto admits being served with a writ in each action and testified that on each occasion, he sought the advice of his solicitor at the time, Mr. Victor Jasparitsch who, at the relevant time, practised law in Thunder Bay and is now a real estate agent in that City. It was Mr. Peotto's testimony that on each occasion, Mr. Jasparitsch advised him that Twin Gate Realty Limited was the true debtor, and promised to "take care of" the matter insofar as Mr. Peotto personally was concerned. The Tribunal is advised that all

four of these judgments were obtained in default of defense. Mr. Peotto at no time took any steps to assure himself that Mr. Jasparitsch had taken steps to prevent the issuance of a personal judgment against Mr. Peotto.

With respect to the fifth judgment, where Mr. Peotto was the sole defendant named in the writ, which he admits being served with, that action arose as the result of a guarantee which Mr. Peotto signed, guaranteeing the debt of his former lawyer, Mr. Jasparitsch. Once again, Mr. Peotto testified that Mr. Jasparitsch promised to "take care of it".

Mr. Peotto also testified that he specifically sought Mr. Jasparitsch's advice, prior to submitting the application to the Registrar, as to how the questions on the application form ought to be answered. Mr. Peotto stated in evidence that Mr. Jasparitsch advised him to answer "No" to question 6.

The Tribunal has on many occasions stressed the importance of accurate and truthful disclosure in the application form submitted to the Registrar. The information contained in the application is basic to the formation by the Registrar of a judgment as to the Applicant's fitness for registration.

A false statement or a non-disclosure in an application is a very serious matter from which it can be easily inferred that the Applicant will not carry on business with integrity and honesty. However, as stated by the Tribunal in the Coniam (1983 C.R.A.T. 60) and Leonard (1985 C.R.A.T. 96) decisions, non-disclosure and falsehood in an application does not ipso facto lead to such a conclusion, nor does it automatically lead to disentitlement; there is still the exercise of judgment with respect thereto.

The Applicant has given an explanation for answering the question falsely. The Tribunal finds that the explanation given by Mr. Peotto is a poor one and that he failed to do everything he ought to have done to assure himself that he was providing the Registrar with accurate information. It is unfortunate that no evidence to support or contradict Mr. Peotto's sworn evidence was made available. Nonetheless, based on the evidence before it, the Tribunal is not prepared to make an order directing the Registrar to carry out his Proposal not to renew Mr. Peotto's registration. The Tribunal is of the view that in the circumstances of this case effective termination of Mr. Peotto's registration and ergo, his means of livelihood, would be unduly severe.

The Tribunal, therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, directs the Registrar to renew Mr. Peotto's registration and that the following conditions be attached to such registration:

1. That for a period of two years following the effective date of the renewal, Mr. Peotto shall not trade in real estate as a broker except as an employee of, and under the supervision and direct management of another registered broker;
2. That such supervising registered broker be provided with a copy of this Order and the Reasons of the Tribunal.



R. RUBY RICHMAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE REGISTRATION

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN, PRESIDING  
BARBARA J. SHAND, MEMBER  
JAMES A. CATHCART, MEMBER

APPEARANCES:

R. RUBY RICHMAN, appearing on his own behalf

STEPHEN AUSTIN, representing the Registrar of  
Real Estate and Business Brokers

DATES OF 8 January 1985

HEARING: 16, 17 April 1986

Toronto

REASONS FOR DECISION AND ORDER

R. Ruby Richman has applied for registration as a salesman under the Real Estate and Business Brokers Act, R.S.O. 1980, Chapter 431. The Registrar has issued a Notice of Proposal to refuse registration based on his opinion that the Applicant is not entitled to registration under section 6 of the Act, namely:

(a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

the particulars of which are set out in the Notice of Proposal.

The Applicant, who was a practising lawyer for nineteen years and a Queen's Counsel since 1975, was disbarred by the Law Society of Upper Canada on June 29th, 1981 for misappropriating client's trust funds. Six counts of theft over \$200.00 contrary to section 294(a) of the Criminal Code were laid against Mr. Richman, directly related to specific acts of the misappropriation, and he pleaded guilty to the six counts receiving a sentence on July 15th, 1982 of thirty months incarceration.

At the time of this hearing, there remain outstanding executions against the Applicant in the Sheriff's Office of the Judicial District of York totalling \$462,186.07 exclusive of interest. Some of these Writs concern misappropriated amounts from clients who did receive full compensation from the Law Society of Upper Canada. There is, in addition, bearing in mind some duplication, a claim from the Law Society for reimbursement of approximately \$300,000.00 plus interest.

The Applicant in substance agreed with the facts set out in the Registrar's Proposal.

On October 4th, 1983, the Applicant submitted an application for registration as a real estate salesman and the Registrar served the Applicant with a Notice of Proposal dated December 13th, 1983.

From the period of the Applicant's release from prison to the present, he has held various employments including the position of Vice-President, Sports, for the World Masters Sport Foundation.

On March 17th, 1986, the Registrar served a Notice of Further Particulars to its original Proposal. The Tribunal ruled that these particulars were completely irrelevant and the Registrar withdrew his evidence in that regard.

It is not necessary for the Tribunal to dwell on the facts as set out in the Proposal by the Registrar as the essential facts are admitted by the Applicant. In addition to the evidence admitted by the Applicant at the outset, the Registrar called the former investigating officer, former Staff Sergeant Cowperthwaite, who gave evidence which aggravated the "alleged facts" in that the Tribunal heard that certain individuals, who only received partial compensation from the Law Society, suffered intense financial hardship as a result of

the misappropriation. Mr. Geoffery Merritt, a practising Toronto lawyer, testified as to Mrs. Yolanda Paul's naivete and helplessness - she was a widow in her seventies who lost over one hundred thousand dollars to Mr. Richman, before she received compensation. The Registrar testified that his concern was generated by several facets - the length of time over which the misappropriation occurred; the amount of the theft involved; the lack of restitution in any real practical sense and the amount of the remaining indebtedness.

Mr. Richman testified on his own behalf, as did his wife and his prospective future employer. The Applicant, in the person of Mr. Richman, presented himself as an extremely intelligent, able, energetic and poised individual and the Tribunal was impressed with both the Applicant, and the recommendations filed with the Tribunal, and his employment since his release from prison. The Tribunal was also impressed with the Applicant's expressed attitude that he was determined to never again involve himself in the type of behaviour which led to his disbarment and prison term.

In argument, the Applicant forcefully submitted that his previous problems were an aberration in an otherwise positive life, and that having paid a very severe penalty for whatever he had done, he should be permitted registration as a salesman.

In opposition to the Applicant's submission, counsel for the Registrar submitted that we were limited to reviewing the Registrar's decision. (Re: Decision of the Divisional Court of the Ontario Court of Appeal, March 9th, 1983, Richard G. Brenner v. The Registrar of Motor Vehicle Dealers and Salesmen, unreported.) Counsel for the Registrar again outlined the lengthy scenario which led to the disbarment; a scenario which included an act of misappropriation after the Law Society auditors had frozen the Applicant's trust account. Counsel also emphasized the substantial indebtedness which, if not the paramount reason for the proposal, was of equal importance to the misconduct.

The Tribunal is of the opinion that a balance of the Applicant's right to a livelihood and the Registrar's duty to protect the public could be achieved in the following manner: that the Applicant be granted registration provided that he has made compensation as to any outstanding judgments or indebtedness to private individuals arising out of his theft, to the complete satisfaction of the Registrar.

We do not agree that we are limited to reviewing the reasonableness of the Registrar's decision. In reviewing the decision of the Registrar, the Tribunal is of the opinion that given all the circumstances, the Registrar's Proposal is reasonable. It is our opinion, however, that a better balance as to the protection of the public's interest and on the other hand, the Applicant's legitimate rights can be achieved by imposing as a condition to his registration the requirement as to restitution and compensation.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar not to carry out his proposal provided the Applicant has paid any outstanding judgments or indebtedness to private individuals arising out of the theft, to the complete satisfaction of the Registrar. This requirement to compensate to the satisfaction of the Registrar is a condition precedent of the registration of the Applicant. If the Applicant fails to satisfy this condition on or before August 31, 1987, the Registrar is ordered to carry out his proposal to refuse to register the Applicant.

TIKKA DATINDER SINGH SODHI

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE REGISTRATION

TRIBUNAL: MARY G. CRITELLI, VICE-CHAIRMAN, PRESIDING  
BARBARA J. SHAND, MEMBER  
HARRY HAYES, MEMBER

APPEARANCES:

TIKKA DATINDER SINGH SODHI, appearing on his own behalf

A.N. MAJAINA, representing the  
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 26, 27 August 1986

Toronto

# REASONS FOR DECISION AND ORDER

This hearing was instituted at the request of Tikka Datinder Singh Sodhi, a salesman registered under the Real Estate and Business Brokers Act, pursuant to section 9 of that Act.

The purpose of the hearing was to consider whether the Tribunal should direct the Registrar of Real Estate and Business Brokers to carry out his Proposal as set out in his Notice of Proposal dated May 26th, 1986 (Exhibit 4) or whether the Tribunal should direct the said Registrar to refrain from so doing and to take some other action in accordance with the said Act and Regulations thereto.

The jurisdiction of this Tribunal to conduct this hearing and the relevant powers of the Tribunal with respect to this hearing are contained in Section 9 of the Real Estate and Business Brokers Act. As the Tribunal's jurisdiction and powers with regard to this matter are derived from and solely from the said Act, the Tribunal must be guided in the exercise of its jurisdiction and powers by the intent and purpose of this legislation. It is the view of the Tribunal that the primary purpose of the Act, which concerns itself with the regulation of real estate and business brokers and

salesmen, is the protection of the interests of the public. This view has been stated by the Tribunal many times.

Section 3 of the Act reads in part as follows:

3.(1) No person shall,

.....  
(b) trade in real estate as a salesman unless he is registered as a salesman of a registered broker;

Section 6 of the Act reads in part as follows:

6.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

Section 8 reads as follows:

8.(1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 6 or 7.

(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 6 or 7 if he were an applicant or where the registrant is in breach of a term or condition of the registration.



Section 9 reads in part as follows:

9.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, he shall serve notice of his proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall inform the applicant or registrant that he is entitled to a hearing by the Tribunal if he mails or delivers, within fifteen days after the notice under subsection (1) is served on him, notice in writing requiring a hearing to the Registrar and the Tribunal, and he may so require such a hearing.

(3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Registrar may carry out the proposal stated in his notice under subsection (1).

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of the Act.

(6) The Registrar, the applicant or registrant who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

Mr. Sodhi is a registrant under the Act. The Proposal of the Registrar that this Tribunal must consider is a proposal to revoke Mr. Sodhi's registration. Paragraph 6 of the Notice of Proposal sets out the Registrar's Proposal as follows:

#### REGISTRAR'S PROPOSAL

PURSUANT TO SECTIONS 6 AND 8(2) OF THE ACT, BUT SUBJECT TO SECTION 9 THEREOF, THE REGISTRAR HEREBY PROPOSES TO REVOKE THE REGISTRATION OF THE REGISTRANT, SODHI, AS IT IS THE REGISTRAR'S OPINION THAT THE REGISTRANT, SODHI, IS DISENTITLED TO REGISTRATION AS A REAL ESTATE SALESMAN UNDER THE SAID SECTION 6.

The Reasons for the Registrar's Proposal are set out in paragraph 7 of the said Notice of Proposal as follows:

#### REGISTRAR'S REASON OR REASONS FOR HIS PROPOSAL

(1) It is the Registrar's opinion that, having regard to his financial position, the registrant, Sodhi, cannot reasonably be expected to be financially responsible in the conduct of his business, within the meaning and contemplation of section 6(1)(a) of the Act and, by reason thereof, the registrant, Sodhi, is disentitled to continuation of registration as a real estate salesman under the Act.

(2) Further, or in the alternative, it is the Registrar's opinion that the past conduct of the registrant, Sodhi, affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, within the meaning and contemplation of section 6(1)(b) of the Act and, by reason thereof, the registrant, Sodhi, is disentitled to continuation of registration as a real estate salesman under the Act.

The particulars relied upon by the Registrar are set out at great length in the Notice of Proposal and in the Notice Further or Other Particulars which is dated August 11th,

1986 (Exhibit 4a). Briefly, the Particulars set out allegations, inter alia, to the effect that:

- (a) Mr. Sodhi has numerous unpaid judgments outstanding against him and against a Company of which he was President;
- (b) Mr. Sodhi has been convicted of criminal offences, including fraud, theft, false pretences, using the mails to obtain money by false pretences and driving while exceeding 80 milligrams in blood alcohol;
- (c) Mr. Sodhi was a party to bankruptcy proceedings commenced against him by one of his creditors;
- (d) Mr. Sodhi failed to disclose the said unpaid judgments, criminal convictions, and/or bankruptcy proceedings when applying for his registration and/or his renewal of registration as a real estate salesman;
- (e) Mr. Sodhi also failed to disclose on his renewal of registration as a real estate salesman the fact that he was carrying on a paralegal business under the trade name of Searchers Paralegal Services;
- (f) Mr. Sodhi was in the practice of using several aliases
- (g) Mr. Sodhi had obstructed an investigation into a complaint made by one Elena De'Seta relating to Searchers Paralegal Services.

As Mr. Sodhi is a registrant under the Act and as he has requested a hearing by the Tribunal to consider the Notice of Proposal of the Registrar, his registration continues until a hearing has taken place and until the Tribunal, if it decides to direct the Registrar to carry out his Proposal, makes its order accordingly.

The proposed hearing dates of August 26th and 27th, 1986 were first conveyed to Mr. Sodhi's solicitors by letter dated June 13th, 1986, from the Registrar of this Tribunal (Exhibit 7-26). These dates were then officially set by the Appointment for and Notice of Hearing dated July 11th, 1986, also served on Mr. Sodhi's solicitors (Exhibit 2).

On August 26th, 1986, Mr. Sodhi attended before this Tribunal unrepresented by solicitors. The hearing before the Tribunal began with a motion for adjournment by Mr. Sodhi who

argued the motion for adjournment himself. The Registrar of Real Estate and Business Brokers advised the Tribunal through counsel that he would agree to the adjournment requested by Mr. Sodhi, if Mr. Sodhi would undertake not to act as a real estate salesman pending the new hearing date. Mr. Sodhi was not willing to give such an undertaking. While the Tribunal does not consider that there was any obligation whatsoever on Mr. Sodhi to give the undertaking requested as a condition of the adjournment, the fact remains that without such an undertaking Mr. Sodhi would be entitled to continue to trade in real estate and carry on the activities permitted to a real estate salesman until the new hearing date.

The adjournment requested by Mr. Sodhi was refused and the following oral reasons for the refusal were delivered by the Tribunal at the conclusion of the motion:

The motion the Tribunal has been considering all morning is one for an adjournment. The motion was made by Mr. Sodhi and is based on three grounds: firstly, that he wishes to be represented by counsel, in particular, Mr. Vasan who is not available to be present at the hearing today; secondly, that the Registrar of Real Estate Brokers has failed to provide him with full particulars of the allegations against him and a fair exchange of documents; and, thirdly, that there is an application for judicial review that has been served on the Tribunal that requests, inter alia, an order in the nature of prohibition restraining this Tribunal from proceeding with the hearing.

Dealing firstly with the third ground, the Tribunal was referred to the Decision of the Ontario Court of Appeal in the case of Re: Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183, 22 D.L.R. (3d) 40. At page 49 of that report, Mr. Justice Arnupp states: "It is also clear law that such a Tribunal is not required to bring its proceedings to a halt merely because it has been served with a notice of motion for an order of certiorari or prohibition. It is entitled, if it thinks fit, to carry its

proceedings forward until such time as an order of the Court has actually been made prohibiting its further activity or quashing some order already made by which it assumed jurisdiction." Accordingly this Tribunal considers that the fact that there is an application now before the Courts is not sufficient grounds for an adjournment of this proceeding.

Dealing with the second ground, there appear to be five documents in question. Firstly, the December 5th, 1985, formal complaint of Elena De'Seta. This was provided to the Applicant yesterday and although there is some dispute as to what occurred, there is some indication that it was proffered by the Registrar of Real Estate Brokers at an earlier time to Mr. Sodhi. It is a short one page document and the Tribunal considers that Mr. Sodhi has had ample time to review it insofar as preparation for this hearing is concerned.

Secondly, there is the March 24th, 1986 complaint that is referred to in the Registrar's Notice of Proposal. The Registrar has been unable to locate such a document and in fact it appears that the reference to the March 24th, 1986, date may be an error. If the document referred to cannot be produced, then the complaint referred to in the Notice of Proposal cannot be relied upon in its present form and accordingly Mr. Sodhi is not prejudiced by the failure to produce the document if it does exist. However, it appears it does not exist.

Thirdly, the Invoice of September 17th, 1985. Mr. Sodhi has a copy of the Invoice but wants to inspect the original. No explanation of the significance of the Invoice has been advanced to the Tribunal. The Tribunal is of the view that Mr. Sodhi ought to be given an opportunity to inspect the original, however, the failure of the Registrar to provide it thus far does not

afford ground for adjournment. We would, however, ask the Registrar to make it available to Mr. Sodhi as soon as possible during the course of the hearing.

Fourthly, the investigative report of Mr. Reese. The Tribunal finds that the Registrar is not obliged to produce this report and relies on the Decision of the Divisional Court in the case of Re: Keller and the College of Physician's and Surgeons reported at 17 O.R. (2d) 516.

Fifthly, there is the note that was allegedly attached to the original application for registration under the Act. As yet, this has not been located. Accordingly, it cannot be produced by the Registrar. An adjournment will not assist Mr. Sodhi in this regard.

The Tribunal is of the view that the material set out in the Notice of Proposal and the copies of documents provided to Mr. Sodhi in advance of the hearing set out with sufficient particularity the case with which Mr. Sodhi has to meet.

With respect to the unavailability of counsel, the Notice of Hearing setting out the August 26th, hearing date was served sometime within a few days of July 11th, 1986. Mr. Vasan apparently was not available on August 26th and chose not to rearrange his affairs so that he could be available. Mr. Vasan called Mr. Sodhi upon receipt of the Notice, so that Mr. Sodhi has had ample time to arrange for other counsel to represent him at this hearing if he so desired.

With respect to this ground, the Tribunal also notes that Mr. Sodhi has thus far demonstrated a high degree of competence in presenting his case, and in particular, he has sufficient competence to prepare the Notice of Application for Judicial Review (marked as Exhibit 3E).



The Tribunal also notes that Mr. Sodhi has been actively involved in most of the preparatory work for this hearing, including numerous attempts to obtain all the documentation which he felt would be necessary in order to prepare adequately.

The Tribunal also has uppermost in its mind its responsibility to protect the public interests and it is in the interest of the public that this hearing proceed with due dispatch.

Finally, the Tribunal refers to section 21 of the Statutory Powers Procedures Act which provides:

21. A hearing may be adjourned from time to time by a Tribunal of its own motion or where it is shown to the satisfaction to the Tribunal that the adjournment is required to permit an adequate hearing to be held.

It has not been shown to the satisfaction of the Tribunal that an adjournment is required in order to permit an adequate hearing to take place and, accordingly, the hearing will proceed.

While the Tribunal was delivering its Reasons with respect to the request for adjournment, Mr. Sodhi interrupted the Tribunal and took issue with the Tribunal's statement that he, Mr. Sodhi, had been advised of the date set out in the Notice of Hearing when his solicitor Mr. Vasan telephoned him upon receipt of the Notice of Hearing dated July 11th, 1986. The Tribunal's notes indicated that this was what Mr. Sodhi had advised the Tribunal in the course of setting out a chronology of what had occurred as part of his original submissions on the motion for adjournment.

Mr. Sodhi, however, took the position that the Tribunal's understanding of his submissions was in error and that he, in fact, had stated that he first became aware of the dates set for the hearing upon his receipt of Mr. Vasan's letter dated August 6th, 1986 (Exhibit 3-a).

The Tribunal has now had an opportunity to determine exactly what Mr. Sodhi said in his original submissions. In the course of setting out a chronology of events for the Tribunal, he stated as follows: "It was sometime around 16th, 17th or 18th of July that Mr. Vasan received the proposed rates. For some reason, Mr. Vasan does not immediately write to Mrs. Verge but calls me and informs me that on the 26th, he is not available and I tell him, please inform the Registrar. He said he would do so and then on August 6th, in less than three weeks, he sends out the letter to Mrs. Audrey Verge saying that he is going to be out of the country".

After the adjournment was refused, Mr. Sodhi withdrew from the hearing room and did not return. The hearing proceeded in his absence on August 26th and 27th, 1986.

The evidence put before the Tribunal on behalf of the Registrar of Real Estate and Business Brokers has established to the satisfaction of the Tribunal on both grounds set out in the Notice of Proposal that the registration of Mr. Sodhi as a real estate salesman should be revoked.

The first reason set out by the Registrar in his Notice of Proposal was:

(1) It is the Registrar's opinion that, having regard to his financial position, the registrant, Sodhi, cannot reasonably be expected to be financially responsible in the conduct of his business, within the meaning and contemplation of section 6(1)(a) of the Act and, by reason thereof, the registrant, Sodhi, is disentitled to continuation of registration as a real estate salesman under the Act.

With respect to this ground, evidence was put before the Tribunal in the form of Sheriff's Certificates showing that there are at least ten unpaid judgments outstanding against Mr. Sodhi in his personal capacity. These judgments date from 1971 to 1985.

It is the view of the Tribunal that the existence of many unpaid judgments, many of which are for substantial amounts, alone suffices to establish that the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business.

The Tribunal also has before it evidence that bankruptcy proceedings were instituted against Mr. Sodhi by one of the judgment creditors.

The second reason set out by the Registrar in his Notice of Proposal is as follows:

To further, or in the alternative, it is the Registrar's opinion that the past conduct of the registrant, Sodhi, affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, within the meaning and contemplation of section 6(1)(b) of the Act and, by reason thereof, the registrant, Sodhi, is disentitled to continuation of registration as a real estate salesman under the Act.

With respect to this reason, there is evidence before the Tribunal that Mr. Sodhi was convicted of the following charges:

<u>Date and Place of Offence</u>	<u>Nature of Offence</u>	<u>Disposition</u>
October 3, 1972 Toronto	(1) Theft (2) False Pretences (2 charges).	(1-2) Suspended sentence and probation for six months.
April 24, 1973 Toronto	Fraud.	9 months.
July 27, 1982 Toronto	Using the mails to obtain money by false pretences.	Conditional discharge and probation for one year.
August 10, 1983 Toronto	Driving while exceeding 80 MG in blood.	Driving licence suspended.

No Certificates of Conviction were put before the Tribunal with respect to the four above-noted offences. It was the evidence of Mr. Coleclough, the Registrar of Real Estate and Business Brokers, that he was advised of the convictions by the Ontario Provincial Police. The Tribunal did have before it a copy of the Indictment relating to the charge of using the

mails to obtain money by false pretenses, which contained handwritten notes indicating that Mr. Sodhi had pleaded guilty to the charge and had received a conditional discharge and probation for a one year period (Exhibit 12). The Tribunal also has before it a copy of a computer printout setting out Mr. Sodhi's driver's licence record which shows that he was convicted of the charge of driving "while exceeding 80 MG in blood" on December 13th, 1984.

Although the rules of evidence before this Tribunal are somewhat more relaxed than they would be before a Court of law, and although the Tribunal is permitted to accept hearsay evidence in the course of a hearing, it is very regrettable that efforts were not made to put the best evidence possible before this Tribunal in order to establish that Mr. Sodhi was in fact convicted of the offences referred to in the Notice of Proposal. Nonetheless, the Tribunal is prepared to accept on prima facie basis that Mr. Sodhi was convicted of these offences. In the event that the Tribunal is in error in making this finding, it wishes to make it clear that it would have arrived at the same final decision with respect to this matter quite apart from this finding as to Mr. Sodhi's criminal convictions.

Nonetheless, the Tribunal is of the opinion that the existence of the criminal convictions referred to above afford reasonable grounds for the belief that Mr. Sodhi will not carry on business in accordance with law and with integrity and honesty.

There is clear evidence before the Tribunal that Mr. Sodhi gave false information to the Registrar as evidenced by the Application for Registration and Application for Renewal of Registration (Exhibits 9 and 9a).

Referring to the first application which is dated June 28th, 1983, Mr. Sodhi gave a negative response to the question, "Are there any unpaid judgments outstanding against you?" As is clear from the outstanding judgments referred to above, there were unpaid judgments outstanding against Mr. Sodhi as of June 22nd, 1983.

The Registrar also alleged in the Notice of Proposal that Mr. Sodhi failed or neglected to give full particulars of his criminal convictions. The Tribunal is not satisfied by the evidence put forward at the hearing that that allegation has been proved. The doubt in the mind of the Tribunal is raised by the fact that the handwritten words "schedule attached"

appear under the signature of Mr. Sodhi on the Application for Registration (Exhibit 9). While the Registrar's records do not include such a schedule, the possibility that such a schedule was attached to the application at the time that Mr. Sodhi filed it with the Registrar certainly exists. Accordingly, the Tribunal places no reliance on this allegation by the Registrar in arriving at its decision herein. It is also important to note that Mr. Sodhi did answer "yes" on the application in response to the question, "Have you ever been convicted under any law of any country, or state, or province thereof of an offence, or are there proceedings now pending? If yes, give full particulars of all such convictions and proceedings on separate sheet."

With respect to the application for Renewal of Registration dated the 24th day of August, 1985, Mr. Sodhi answered "No" to question 4b which reads: "Have you ever had a licence or registration of any kind refused, suspended, revoked or cancelled? If so give full particulars."

There is evidence before the Tribunal that at the time that Mr. Sodhi completed this application, his driver's licence had been suspended on two separate occasions in 1984. Accordingly, the answer provided by Mr. Sodhi is false.

With respect to question 5(a) on the application Mr. Sodhi answered "No" to the question: "Are you a discharged or undischarged bankrupt or presently a party to bankruptcy proceedings?" Mr. Sodhi was a party to bankruptcy proceedings at the time, namely, the proceedings referred to above commenced by the judgment creditor Art-U Graphics Ltd. Exhibit 4(a)-3 is an Affidavit of Service indicating that Mr. Sodhi was served with a petition for receiving order on June 13th, 1985, that is, prior to the date he completed the Renewal Application.

Mr. Sodhi also answered "No" to the question: "Are there any unpaid judgments outstanding against you?" Again this was clearly untrue.

In response to the question: "Have you ever been convicted under any law of any country, or state, or province hereof of an offence or are there any proceedings now pending? If yes give full particulars of all such convictions and proceedings on separate sheet", Mr. Sodhi has answered "No". Directly below that question, there is a printed note which reads:



Where the applicant has been previously registered, list only those convictions which have occurred since the date of last filing. You are not required to disclose any convictions for which a pardon has been granted under the Criminal Records Act and which pardon has not been revoked.\*

Beside this note, there is an asterisk, and the asterisk is repeated below with a note in handwriting, presumably Mr. Sodhi's, stating, "The same as when applied". Even if the Tribunal assumes that a note was attached to the original application disclosing the first three convictions referred to in the Notice of Proposal, Mr. Sodhi was convicted of an additional offence between the time he completed the original application and the time he completed the application for Renewal of Registration. This is the conviction for "driving while exceeding 80 MG in blood" that is referred to above. In view of this conviction, Mr. Sodhi's answer to question seven is clearly false.

With respect to the question on the Renewal Application, "Will you be engaged or employed in any other business, occupation or profession?", Mr. Sodhi failed to disclose the fact that he was engaged and employed in the business of Searchers Paralegal Services. It was the evidence of Mrs. Elena De'Seta that her dealings with Mr. Sodhi commenced at the end of August 1985. He provided her with paralegal services for which he later invoiced her on the letterhead of Searchers Paralegal Services, 50 Power Street, Toronto, Ontario.

The Tribunal is of the view that the fact that Mr. Sodhi furnished false information on the two applications referred to is of itself sufficient "to afford reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty".

The Tribunal, as indicated above, heard the evidence of Mrs. Elena De'Seta who dealt with Mr. Sodhi in his capacity as a paralegal carrying on under the style of Searchers Paralegal Services. It was the evidence of Mrs. De'Seta that on September 5th, 1985 Mr. Sodhi agreed to incorporate a business for her and he paid him the sum of \$520.00. He promised her that he would proceed with and complete the incorporation within a matter of days. However, Mr. Sodhi failed to do the incorporation, despite numerous telephone calls by Mrs. De'Seta and by her husband Robert De'Seta. Finally Mrs. De'Seta retained another solicitor and on September 5th, 1985, she placed a complaint with the Consumers



Advisory Services branch of the Ministry of Consumer and Commercial Relations. Shortly thereafter she was able to reach Mr. Sodhi by telephone and at that time, he promised to return her money to her. To date he has not done so. Mrs. De'Seta testified that she has had no further direct contact with Mr. Sodhi, but that she has become aware that Mr. Sodhi has sent a number of letters to her former landlord, her bank, her former partner and the major supplier of her present business.

The Tribunal has before it two of these letters (Exhibits 16 and 14g). Mrs. De'Seta testified that in the letter of July 4th, 1986 written by Mr. Sodhi to her former landlord Mr. Rosano Savassi (Exhibit 14g), Mr. Sodhi disclosed confidential information.

In the view of the Tribunal, Mr. Sodhi's conduct in his dealings with Mrs. De'Seta afford reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty. The Tribunal in particular relies on the fact that he failed to incorporate her business as he had promised Mrs. De'Seta, he failed to refund her money after he promised to do so, and he disclosed confidential information to her former landlord.

Counsel referred the Tribunal to the unreported Decision of the Divisional Court in Re: Brenner and the Registrar of Motor Vehicle Dealers and Salesmen. There the Divisional Court considered the effect of section 7(4) of the Motor Vehicle Dealers Act. That section is almost identical to section 9(4) of the Real Estate and Business Brokers Act. At page four of its Decision which was delivered on April 7th, 1983, Mr. Justice Southey states:

The effect of section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for the belief that he would not carry on business in accordance with law and with integrity and honesty.

Given the evidence before it, the Tribunal is of the opinion that the Registrar was not in error in his conclusion that Mr. Sodhi would not carry on business in accordance with law and with integrity and honesty. Furthermore, the Tribunal

is of the opinion that the Registrar was not in error in concluding that Mr. Sodhi could not reasonably be expected to be financially responsible in the conduct of his business.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal and refuse registration. \*

\* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by Tikka Datinder Singh Sodhi. The appeal had not been concluded at the time of this publication.

COSMOPOLITAN TRAVEL BUREAU LTD.

APPEAL FROM THE DECISION OF THE  
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT  
TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
KEITH COPPARD, MEMBER

APPEARANCES:  
LAWRENCE S. GOLD, representing the Applicant  
MICHAEL D. LIPTON, Q.C., representing the  
Board of Trustees

DATE OF  
HEARING: 10 June 1986 Toronto

REASONS FOR DECISION AND ORDER

Cosmopolitan Travel Bureau Ltd. appeals the decision of the Board of Trustees under the Travel Industry Act wherein the Trustees determined that Cosmopolitan's claim made pursuant to Section 15(3) of the Schedule to Regulation 938 R.R.O. 1980 was not eligible for payment.

The salient facts related to the claim briefly are as follows:

Cosmopolitan, a registered travel agent and travel wholesaler, is also a registered I.A.T.A. appointee for Pan American Airlines. As an appointee, it can issue Pan American tickets directly. Barton Travels Limited, a registered travel agent, purchases such airline tickets for its clients from Cosmopolitan. Cosmopolitan issued the tickets in the name of the client but was paid by cheque drawn on Barton's own account. As it turned out, five cheques issued by Barton between June 29, 1985, and July 19, 1985 were returned by the bank marked "insufficient funds". Some replacement cheques were issued by Barton, but they too proved to be non-negotiable. The tickets which Cosmopolitan issued were not in all cases used immediately, but Mr. Sharma one of the owners of Cosmopolitan, did not attempt either to cancel any of the outstanding tickets after the financial difficulties with Barton first came to light or to demand payment in cash or certified cheque for new tickets to be issued.

These steps were not taken, partly because the firm wanted to maintain its account in good standing with Pan American Airlines, and partly because of the potential negative impact such action would have on the firm's reputation in the Indian community. However, initially no action was taken because Cosmopolitan fully expected to be paid in due course. Eventually all of the tickets issued by Cosmopolitan were delivered to and used by Barton's clients.

Although Cosmopolitan made several attempts to recover the money owing from Barton, it was unsuccessful. Subsequently, Cosmopolitan reported the situation to the Ministry and some time later Barton's registration as a travel agent was suspended.

Cosmopolitan's initial claim against the fund was for some \$21,897.00. During the hearing, the claim was reduced to \$655.00 which was the total amount represented by the cheques issued by Barton on June 29 and July 16, 1985. It appears that at the time the remaining three cheques were accepted by Cosmopolitan, it knew that the first two had been returned by the bank.

Mr. Gold, counsel for Cosmopolitan argued that the claim, as adjusted, was four square within the language of Section 15(3) of the Schedule and should, therefore, be allowed. He distinguished the cases previously cited to him by Mr. Lipton wherein claims had been disallowed by this Tribunal.

Mr. Lipton relied on these previous decisions in support of his argument that since the clients of Barton were never at risk, because they obtained the travel services almost immediately, the fund was not available to reimburse the travel wholesaler, particularly in circumstances where there was an apparent extension of credit to the travel agent.

The Tribunal has carefully reviewed the decisions cited and the legislation itself before reaching its conclusion.

Section 23 of the Regulations outlines the obligations and duties of a travel agent or travel wholesaler with respect to monies received for the purchase of travel services. Subsection 2 of this Section states that all funds received by a travel agent or a travel wholesaler for the purchase of travel services to be performed in the future are deemed trust funds. Subsection 5 requires all such trust funds, whether received by cash, cheque or otherwise, to be deposited in a trust account within two banking days of receipt. Subsection 7

provides that no travel agent or travel wholesaler shall disburse or withdraw any monies held in trust until payment is to be made to the person providing the travel service.

In an ideal world, if all the requirements as to trust funds are complied with, the client paying for travel services, may feel confident that his money will be properly used and will be recoverable in the event that something goes wrong. To further protect the client, a compensation fund was established.

In the context of the Regulations made under the Act, a "client" although not specifically so defined, is a person who purchases travel services from a travel agent for his own use or for the use of another at his expense and not for resale to another person.

The Schedule to the Regulations made under the Travel Industry Act, sets out the scheme of the compensation fund, how it is to be established, how it is to be administered and by whom, and how claims are to be paid out.

Mr. Gold asks the Tribunal to read Section 15(3) of the Schedule in isolation and to make its decision on that basis alone. The Tribunal does not accept that argument. In the Tribunal's opinion, the subsection should not be read in isolation but should be read in the context of the Act, the regulations and the Schedule and, in particular, in the context of Section 15 of the Schedule.

The preamble to Section 15(1) reads as follows:

The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements.

(emphasis added)

There then follow the conditions relating to the client which must be satisfied before payment out of the fund may be made, namely, that:

- the client must have made payment for travel services to a travel agent, and
- the travel services must not have been received.

The purpose of the fund is clear - to reimburse the client/consumer where through no fault of his own, he is denied travel services for which he has paid. The purpose of the fund was not extended or expanded by the inclusion of subsection 2 of the section or the addition of subsection 3 some time later.

Subsection 2 of Section 15 allows a travel agent to turn to the fund if a travel wholesaler fails to provide the travel services paid for by a client, if the travel agent chooses at his own expense, to make other arrangements on the client's behalf. The travel agent, by taking such action, steps into the shoes of the client, who could otherwise have claimed against the fund, and is therefore able, in turn, to claim on the fund. This is entirely in keeping with the stated purpose of the fund.

Subsection 3 of Section 15 was added some time later. The Tribunal was told by the Registrar, Mr. Caven, that it was enacted with the intention of putting the travel wholesaler on a similar footing as the travel agent in subsection 2 in situations where travel services were not available or provided to a client even though the client had paid a travel agent for them. The client, having paid the travel agent for travel services which were not receivable because the money had not passed to the wholesaler, would have a claim against the fund. If the travel wholesaler then either reimbursed the client or provided the travel service contracted for, the wholesaler could take the place of the client and claim.

In subsection 3, the words "has provided the travel service contracted for but not paid for by the travel agent", in isolation, could be interpreted to mean travel services provided at anytime. However, if these words are so interpreted, and it did not matter if the client ever had a crystallized claim against the fund, the nature of the fund would be substantially altered. It would be, as the Tribunal in other decisions described it, an insurance fund for the bad debts or business risks of the travel wholesaler. Had this been the intention, the purpose of the fund would have been amended to reflect this.



In the Tribunal's opinion, the quoted words, in the context of the whole of the Regulations, the Schedule and in particular Section 15, should be and can be interpreted in the sense that the travel wholesaler has provided the travel service after the client has been put in the position that the contracted travel service is not available to him because the travel agent has failed to pass the client's money to the travel wholesaler. In such a situation, the client has a claim against the fund. By then providing the travel service, the wholesaler steps into the shoes of the client and may claim in his place.

Unless this sequence of events prevails in the first instance, a travel wholesaler has no access to the fund, and it is immaterial whether he extended credit to the travel agent or was a victim of fraud, or whether he acted in good faith and at arm's length.

In the present case, there was never any suggestion that travel services would not be received by Barton's clients. Barton's clients were never in the position of having a claim against the fund. They received the travel services contracted for almost immediately and used them. Therefore, the claim of Cosmopolitan must fail because it did not provide the travel service in accordance with subsection 3 of Section 15 of the Schedule.

Therefore by virtue of the authority vested in it under Section 16(3) of the Schedule to revised Regulation 93 under the Travel Industry Act, the Tribunal disallows the claim of Cosmopolitan Travel Bureau Ltd.

## ONKAR TRAVELS

APPEAL FROM A DECISION OF THE  
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT  
TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, VICE-CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
GLORIA ANEVICH, MEMBER

## APPEARANCES:

RATINDER PAL SIDHU

Agent, representing the Applicant

MICHAEL D. LIPTON, Q.C.,

representing the Board of Trustees

## DATE OF

HEARING: 4 November 1986

Toronto

REASONS FOR DECISION AND ORDER

The hearing was requested by the claimant Onkar Travels pursuant to Section 16(1) of the Schedule to Regulation 938, R.R.O. 1980, under the Travel Industry Act, R.S.O. 1980, Chapter 509, for the review of a Decision made by the Board of Trustees appointed under that Schedule whereby the claimant was denied payment of its claim against the Compensation Fund in the amount of \$43,340.00.

The claimant is a travel agent and it is admitted that at all relevant times, it was a participant as defined in the Schedule. The travel agent claim form filed by the claimant with the Board of Trustees alleges that funds were paid over by the claimant to Skybridge Tours. Skybridge Tours is described in the same claim form as a travel wholesaler.

Under subsection 15(2) of the Schedule, where a claim is made against the Compensation Fund by a travel agent who has passed funds to a travel wholesaler, in order for the claim to succeed, it must first be established that both the travel agent and the travel wholesaler were participants at the time that the funds were passed. A participant is defined in the Schedule as any travel agent or travel wholesaler who is a subscriber to the Fund with the approval of the Registrar. While the claimant was clearly a participant, the evidence before us indicates that the wholesaler was not a participant.

Exhibit 9 comprises a number of certificates issued pursuant to Section 26 of the Travel Industry Act. These indicate that the following entities have either never been registered under that Act and have never been participants in the Compensation Fund or were not so registered and were not participants at the time that the claimant passed its funds to Skybridge Tours: Skybridge Travel, Skybridge Tours, Skybridge Tours Eastern Inc., Skybridge Travel Inc., Century Tours (Skybridge), and Century Tours Ltd.

The claimant has argued that it acted throughout in good faith without knowledge that Skybridge Tours was not a participant. This is not disputed by counsel for the Board of Trustees. While the Tribunal sympathizes with the claimant, its hands are tied in this matter. The Tribunal's authority extends only to claims which clearly fall within the terms of Section 15 of the Schedule. It has no authority or discretion to stretch the ambit of the coverage beyond the limits that the drafters of the Schedule clearly intended to apply.

Accordingly the Tribunal must hold that the claimant does not have a valid claim against the Fund. By virtue of the authority vested in it under Section 16(3) of the Schedule to Revised Regulation 938 under the Travel Industry Act, the Tribunal disallows the claim of Onkar Travels.

TOUR EAST HOLIDAYS (CANADA) INC.

APPEAL FROM A DECISION OF THE  
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
DR. STUART E. ROSENBERG, MEMBER  
JOHN H. AUSTIN, MEMBER

APPEARANCES:

WILLIAM WONG, representing the Applicant

MICHAEL D. LIPTON, Q.C., representing the  
Board of Trustees

DATE OF

HEARING: 3 June 1986

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Tour East Holidays (Canada) Inc., a registered travel wholesaler and travel agent is appealing the decision of the Board of Trustees under the Travel Industry Act, wherein the Board denied the claim of Tour East. The claim was made under Section 15(3) of the Schedule contained in Regulation 938 under the Travel Industry Act, R.R.O. 1980.

The facts leading to the claim are as follows:

Tour East had been dealing with the owners of Manila International Travel, a registered travel agent, since 1983. As a travel agent, Manila could only sell to the public, travel services provided by another person. When Manila's clients needed air travel tickets, Manila would have to purchase the tickets from a travel wholesaler or a carrier. Manila could obtain travel services for its clients from any travel wholesaler who chose to do business with it. According to the evidence, Manila dealt with several travel wholesalers in addition to Tour East. Tour East accepted cash, cheques or credit card vouchers as payment for air travel tickets. In some cases, Tour East supplied the tickets directly from the carrier and in others obtained them from other travel wholesalers.

To facilitate the purchase of air travel tickets by credit card, Tour East provided Manila with blank universal credit card vouchers which Manila would complete in its offices as needed. This would include inserting the name of the credit card issuer, the credit card number and the name and signature of the credit card holder. If the passenger was not the holder of the credit card, his name would also be inserted in the space provided for that purpose.

When Manila needed tickets, Tour East would first be advised by telephone. Then Manila staff or the owners would come to the office of Tour East with the cash, cheques and/or completed credit card vouchers and pay for the airline tickets. If credit card vouchers were involved in the transaction, Tour East would telephone the credit card issuer and obtain an approval code number which would then be inserted on the credit card voucher by Tour East. Tour East would then hand over the tickets to Manila.

During May, 1984, Manila, following the same procedure obtained, through three separate transactions, a number of airline tickets. These tickets were "paid for" in part by credit card vouchers. As it turned out, the credit card vouchers were fraudulent. Manila, evidently using information it had on file, inserted the names of credit card holders and the credit card numbers without the knowledge of the credit card holders and forged the signature of those holders. In due course, the frauds were discovered and charges under the Criminal Code were laid against the principals of Manila. Using the same fraudulent scheme, Manila victimized several other travel wholesalers and a carrier.

Meanwhile, of course, the travel tickets having been issued by Tour East, were used by the ticket holders who had, it appears, paid Manila initially and who were at all times innocent parties to the scheme.

When Tour East, one of the victims of the fraud, discovered that payment for the travel tickets would not be forthcoming from the credit card issuers, it decided for whatever reason to pay the actual supplier of the tickets out of its own funds. To mitigate its loss, it obtained a promissory note from Manila for \$6,501.38 and, in fact, recovered \$3,000.00. For the balance owing, Tour East now seeks to recover from the Compensation Fund established under the Travel Industry Act.

As noted above, the claim is made under Section 15(3) of the Schedule which reads:

(3) Where a participant who is a travel wholesaler has acted in good faith and at arm's length with a participant who is a travel agent and the travel agent has failed to pass his client's money to the travel wholesaler and the travel wholesaler has, at his own expense, reimbursed the client or has provided the travel service contracted for but not paid for by the travel agent to the travel wholesaler, the travel wholesaler shall be entitled to claim for the refund of that portion of the client's moneys received by the travel agent that the travel agent failed to pass to the travel wholesaler, but in no event shall the travel wholesaler be entitled to claim any portion of such moneys that represent commissions.

Mr. Wong, counsel for Tour East, argued that his client had acted throughout in good faith and had never intended to and did not extend credit to Manila. He said his client had dealt with Manila at arm's length. There was, he said, an ultimate failure to pass funds through the travel agent (Manila) to the travel wholesaler (Tour East). There was no suggestion that travel services had not been provided to the clients since the tickets had been used. It was his submission that all the criteria set out in subsection 3 of section 15 had been satisfied and, therefore, his client was entitled to payment out of the Compensation Fund.

Mr. Lipton argued that compensation from the Fund was only available to a travel wholesaler if the wholesaler elected to put the consumer/client's interest before his own and either provided the travel services to the consumer or repaid the money to him. In other words, if a client had paid a travel agent for travel services and the travel services were subsequently put in jeopardy because of some action of the travel agent, the travel wholesaler who was the provider of the service could elect to provide the travel services paid for but not yet used even though he had received no money therefor or could give the money paid to the travel agent back to the client. Only in these circumstances, it was argued, could the travel wholesaler claim against the Fund.



In the present case, since the clients were never risk (they got the tickets and used them), and since Tour East was unaware of the fraud prior to the travel services being used and, consequently, could not have made conscious election or decision to do anything related to the client, the Fund was not obliged to reimburse it for its loss.

In support of his submissions, Mr. Lipton referred the Tribunal to several of its earlier decisions which he believed would assist it in its deliberations.

In the first decision cited, Ontario Motor League World Wide Travel (London) Ltd., heard in 1979, the claim was under section 15(2) of the Schedule. Subsection (2) limits a claim for refund to that portion of the client's money passed by the travel agent to the travel wholesaler. In that case, the travel agent paid the travel wholesaler for travel services out of its own funds. The client could not take the trip for medical reasons and the travel agent advised the travel wholesaler accordingly and asked for a refund of its money. The travel wholesaler did not refund the money and some time later ceased to carry on business. When it was evident that a refund would be forthcoming, the travel agent applied to the Fund for compensation. The Tribunal held that because the travel agent had not passed his client's money to the travel wholesaler, that of itself constituted a bar to the claim. As an aside, the Tribunal added that the Travel Industry Act had been passed for the protection of the public and said that, "This decision will properly be interpreted that an agent dealing with a wholesaler must collect clients' funds prior to making payments to the wholesaler to protect his interests".

The next decision, Der Travel Service Limited, issued in July, 1981, dealt with a claim by a travel wholesaler under Section 15(3). In rejecting the claim, the Board of Trustees cited three reasons, namely, that at no time were the clients' monies received by the travel agent; that the claim was a travel debt not covered by the legislation; and no reasonable effort was made by the travel wholesaler to collect the debt from the travel agent. The Tribunal made no clear finding on the issue of passage of clients' monies although it did appear to have some doubt that the travel tickets had been used. Without elaborating on the facts, the Tribunal found that the claims arose from what the Tribunal considered to be in essence travel debts. Having come to this conclusion, the Tribunal went to some pains to explain why such debts were not recoverable from the Fund.

These were that:

- business risks were not intended to be insured by the Fund;
- the Fund should not and cannot operate as a kind of business insurance to protect firms against ordinary business losses;
- the Fund was designated for the protection of the consuming public;
- credit extended must be at the risk of the travel wholesaler and not at the risk of the Fund.

The Tribunal then went on to say:

The Fund can operate to protect a travel wholesaling firm in a case where it has sustained a loss as the result of some act undertaken deliberately to protect a consumer or consumers who would otherwise have sustained a loss.

Mr. Lipton laid great stress on this statement.

The third decision, M & M Travel, issued January, 1982, dealt with a situation where a travel agent passed his client's money to a travel wholesaler who failed to provide the travel services required. The travel agent, M & M Travel, arranged for a substitute trip for which it paid out of its own funds, meanwhile cancelling the original trip and demanding a refund. Before a refund was made by the travel wholesaler, it ceased business. M & M Travel then claimed against the Compensation Fund. The Board of Trustees refused the claim on the grounds that the claim represented a business loss and that M & M had not diligently attempted to recover the money from the travel wholesaler. The Tribunal relied on the "rules" laid down in the Der case. It said that in its view, "the principles established in those cases are binding upon us, especially the rules we laid down in the case of Der Travel. This Fund is not business insurance. It exists to protect the public, not business concerns which may choose to extend credit at their own risk beyond the limits of reasonable prudence", and denied the claim on this basis. The Tribunal did not address itself to the specific wording of Section 15(2) of the Schedule.

The fourth decision cited by Mr. Lipton was that of Five Continents Travel Agency issued in May, 1983. That decision dealt with a claim by a travel wholesaler. In that case, a travel agent (M) obtained 69 travel tickets for another travel agent (B) from Five Continents, the wholesaler. Although the clients had paid their travel agent B and B had passed the monies, some \$114,000 to M, M failed to pass the monies to Five Continents. Although the failure to receive payment for the 69 tickets was discovered the following day, Five Continents believed it could not prevent the use of the tickets which had been delivered by that time by M to B and then to B's clients. The clients, therefore, received the travel services for which they had paid and Five Continents was 'out' \$114,000. In spite of this, Five Continents continued to do business with M and evidently took a mortgage on M's house for some \$60,000 as security for the \$114,000. The claim finally made against the Compensation Fund was for some \$60,000.

The Tribunal found that there had been a de facto extension of credit from Five Continents to M.

The Reasons for Decision of the Tribunal in that case read, in part, as follows:

Rule 15(2a) [now Section 15(3)] applies where a Travel Wholesaler elects to put the interests of a consumer before his own and suffers loss. There was no such noble election in this case. No such noble option was exercised because we do not think it was available or even perceived by the Wholesaler to be available to him...In particular, a bad precedent, if we were to set it in this case, would expose the fund to claims for trade losses making it a kind of business insurance instead of pure protection for members of the traveling public as consumers as it is meant to be. It would also lower the standards of good business practice in this industry by encouraging all manner of sloppy practices through the implied assurance that it would stand by to protect against losses arising from these.

After quoting, with approval, from the three decisions previously noted, the Tribunal denied the claim of Five Continents and upheld the decision of the Board of Trustees.

The final decision brought to the attention of the Tribunal was that of International Agency Travel Service issued in July, 1983.

The facts in this case are simple. A travel agent received some \$1,945.00 from a client to purchase an air travel ticket. The travel agent obtained the required tickets from the travel wholesaler but did not pass the client's funds to him. Nevertheless, the ticket was delivered to the travel agent and in turn, to the client, who made full use of it. The travel agent went into bankruptcy before the travel wholesaler could be paid. The travel wholesaler then filed a claim against the Compensation Fund, but the claim was rejected by the Board of Trustees. The wholesaler then appealed to this Tribunal. The Tribunal found on the evidence that the travel wholesaler had extended credit to the travel agent and said that the extension of credit "divorced" the person from the protection of the Fund. It said, further, that "the fund is not business insurance, it protects consumers and, in some cases registrants against some risks inherent in the receiving and giving of travel services".

The Tribunal then confirmed the decision of the Board of Trustees.

These decisions have been of assistance to the Tribunal in its deliberations in this case. However, the Tribunal believes it is necessary to look to the legislation itself in reaching its decision.

The purpose of the Compensation Fund is clearly and unequivocally set out in the preamble to Section 15(1) of the Schedule. It reads as follows:

The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay...

(emphasis added)

The Fund has been established only for the benefit of the client and for no other person.

Subsections (2) and (3) of Section 15, therefore, cannot be read in isolation but must be read in conjunction with the clearly stated purpose of the Fund. The only way a travel agent or a travel wholesaler can have access to the Fund is, if in essence, he stands in the shoes of the client who would otherwise have access to the Fund.

Although the decisions of the Tribunal previously noted have wandered off on different tangents and have not expressed this proposition explicitly, it can be inferred from them.

If in the first instance, the client never had a claim on the Fund because he fully received the travel service for which he had paid and used it, then no one else can claim in the client's stead even though the third party may be out of pocket as a result of the transaction.

In the instant case, the clients of Manila appear to have paid for travel services, and clearly received and used them. They never had a claim against the Fund, therefore, on this ground the Tribunal finds that the claim of Tour East must fail. Accordingly it is immaterial whether Tour East extended credit to Manila or was a victim of fraud or whether it acted in good faith and at arm's length or not.

By virtue of the authority vested in it under Section 16(3) of the Schedule to revised Regulation 938 under the Travel Industry Act, the Tribunal disallows the claim of Tour East Holidays (Canada) Inc.

UNITED TRAVELS

APPEAL FROM THE DECISION OF THE  
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT  
TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
HELEN J. MORNINGSTAR, MEMBER  
MARGARET DONALD, MEMBER

APPEARANCES:

JOSEPH VARGHESE, its Agent

MICHAEL D. LIPTON, Q.C., representing the  
Board of Trustees

DATE OF

HEARING: 26 June 1986

Toronto

REASONS FOR DECISION AND ORDER

United Travels appeals the decision of the Board of Trustees under the Travel Industry Act wherein the Board determined that United's claim made pursuant to Section 15(3) of the Schedule to Regulation 938, R.R.O. 1980, was not eligible for payment.

The facts related to the claim briefly are as follows:

United Travels is a registered travel wholesaler and participant in the Compensation Fund established under the Travel Industry Act. Barton Travels Limited was a travel agent and also a participant in the Fund. United had a business relationship with Barton because Barton periodically purchased travel services for its clients from United. Barton also purchased travel services from other travel wholesalers including Cosmopolitan Travel Bureau Limited.

In mid-July, 1985, Barton purchased a number of travel tickets for two clients, the Thomas family and the Simon family. The tickets were paid for in part by two postdated cheques, each in the amount of \$4,1085.16, drawn on Barton's bank account. The cheques were dated August 6, 1985 and August 9, 1985. Although the cheques were postdated,



Barton asked United to delay in presenting the cheques for payment. Meanwhile the issued tickets were used by Barton's clients, the first departure date being July 27, 1985.

As agreed, United did delay in presenting the cheques for payment, but finally in November the cheques were deposited by United. They were returned by Barton's bank marked "N.S.F." and "payment stopped".

In another transaction on December 13, 1985, likely after the cheques from the July transaction had been returned, Barton purchased a travel ticket for another client from United. The ticket was again paid for by a cheque drawn on Barton's account. The cheque was dated December 13, 1985, but evidently not deposited until December 24. It too was returned marked "N.S.F." The departure date on the ticket was December 22, 1985, and it appears that the client received and used the ticket on that date.

United, having failed to recover its money from Barton, sought to be reimbursed for all of the abovenoted tickets from the Compensation Fund under the provision of Section 15(3) of the Schedule to the Regulation. The total amount claimed was \$10,893.76. The claim was denied by the Board of Trustees on the basis that "this claim is a 'trade debt' and does not come under the regulations for claim against the Fund." It is this decision which is now under appeal to this Tribunal.

Mr. Lipton, counsel for the Board of Trustees, cited in argument five of this Tribunal's earlier decisions in support of his submission that the claim should be disallowed. Mr. Varghese, the vice-president of United, argued that he never intended to extend credit to Barton, that the amounts owing were not trade debts, that trade debts are not even mentioned in Section 15(3) of the Schedule and that United, meeting all of the conditions contained in the subsection, was entitled to be reimbursed.

In recent weeks this Tribunal has dealt with two separate claims by travel wholesalers who supplied tickets to a travel agent but have not received payment for them.

In its decision in Tour East Holidays (Canada) Inc., released on June 27, 1986, the Tribunal reviewed, in some detail, the five decisions cited by Mr. Lipton and does not propose to do so again.

In the Cosmopolitan Travel Bureau Ltd decision released July 11, 1986, a case on all fours with the present appeal, the Tribunal went to some length to review the legislation governing the establishment of and access to the Compensation Fund. The Tribunal's conclusion was as follows:

In subsection 3, the words "has provided the travel service contracted for but not paid for by the travel agent," in isolation, could be interpreted to mean travel services provided at any time. However, if these words are so interpreted, and it did not matter if the client ever had a crystallized claim against the fund, the nature of the fund would be substantially altered. It would be, as the Tribunal in other decisions described it, an insurance fund for the bad debts or business risks of the travel wholesaler. Had this been the intention, the purpose of the fund would have been amended to reflect this.

In the Tribunal's opinion, the quoted words, in the context of the whole of the Regulations, the Schedule and in particular Section 15, should be and can be interpreted in the sense that the travel wholesaler has provided the travel service after the client has been put in the position that the contracted travel service is not available to him because the travel agent has failed to pass the client's money to the travel wholesaler. In such a situation, the client has a claim against the fund. By then providing the travel service, the wholesaler steps into the shoes of the client and may claim in his place.

Unless this sequence of events prevails in the first instance, a travel wholesaler has no access to the fund, and it is immaterial whether he extended credit to the travel agent or was a victim of fraud, or whether he acted in good faith and at arm's length.

The Tribunal does not accept Mr. Varghese's submission that he did not intend to extend credit to Barton. The facts speak for themselves. However, as the Tribunal has pointed out, this is immaterial if the client or clients received the travel services without ever being in the position of having the travel services refused or in some way put in jeopardy. Here the clients of Barton were never at risk. They obtained and used the air travel tickets shortly after they were obtained by Barton and before Barton's cheques were deposited by United. United Travels, in these circumstances can have no access to the Fund.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Schedule to Revised Regulation 938 under the Travel Industry Act, the Tribunal disallows the claim of United Travels.

ANGELA STIPPINGER  
(AGS INTERNATIONAL TRAVEL & SERVICES)

HEARING TO CONSIDER AN APPLICATION  
FOR A STAY BY THE APPLICANT OF THE  
ORDER OF THE REGISTRAR UNDER THE TRAVEL INDUSTRY ACT  
FOR IMMEDIATE TEMPORARY SUSPENSION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
DR. STUART E. ROSENBERG, MEMBER  
JOHN AUSTIN, MEMBER

APPEARANCES:

GERD STIPPINGER, Agent, representing the Applicant

A.N. MAJAINA, representing the the Registrar  
under the Travel Industry Act

DATE OF

HEARING: 4 June 1986

Toronto

REASONS FOR RULING

The Applicant, AGS International Travel & Services, has filed an appeal from the Proposal of the Registrar under the Travel Industry Act to revoke its registration and has asked the Tribunal to stay the order of immediate Temporary Suspension.

At the outset of the hearing, the Tribunal made it clear that it would not deal with the merits of the appeal on the Proposal, but only with the issue of whether a stay of the Registrar's suspension Order should be granted pending a full hearing of the matter.

Mr. Majaina, counsel for the Registrar, has asked that the Order be extended under section 7 of the Travel Industry Act. Without repeating what was in the Registrar's Proposal, he noted the many instances where the Applicant has failed to comply with the Act and the Regulations. He also noted the numerous times that the Applicant has promised to comply with the Act and has failed to do so. Mr. Stippinger, appearing for AGS, has not denied that there has been non-compliance. He advised the Tribunal that the primary effort was to establish the business, and that the requirements of the Act were neglected. He stated that this was a deplorable situation and the Tribunal agrees with this assessment.

In a decision in 1984, this Tribunal determined the guidelines for dealing with applications for a stay of an Order. These guidelines are:

- 1) that the appeal be bona fide;
- 2) that the grounds of appeal are substantial; and
- 3) that the balance of interest is in favour of the Applicants.

Mr. Stippinger has said that if the Order is extended then AGS would be out of business. On the other hand, the Tribunal must weigh the possible risk to the public. Given the past conduct of the Applicant and the repeated failure to meet its undertakings, the Tribunal believes that the public would not be well served if the Order was allowed to expire. Any person desiring to enter into the travel agency business must do so on the understanding that it is a regulated industry, and that all facets of the Act and its Regulations must be complied with if that business is to be allowed to continue to operate.

Therefore, this Tribunal adjourns the hearing sine die to be brought back on 10 days' notice to both sides to a date to be fixed by the Registrar, and it Orders by virtue of the authority vested in it under section 7 of the Travel Industry Act that the time of expiration of the said Order of Interim Suspension be and the same is extended until the hearing is concluded.

CENTENNIAL PLYMOUTH CHRYSLER (1973) LTD.  
D. BROWN MOTORS (BARRIE) LIMITED  
GORDON D. COATES

HEARING TO CONSIDER AN APPLICATION FOR A STAY UNTIL  
DISPOSITION OF THE APPEAL OF A DECISION AND ORDER OF  
THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL  
DIRECTING THE REGISTRAR TO CARRY OUT HIS PROPOSAL TO  
REVOKE THE RESPECTIVE REGISTRATIONS OF THE  
APPLICANTS FORTHWITH UPON THE ISSUANCE OF THE  
REASONS FOR DECISION.

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
DR. STUART E. ROSENBERG, MEMBER  
KEITH COULTER, MEMBER

APPEARANCES:

ROBERT J. CARTER, Q.C., representing the Applicants

STEPHEN P. MARTIN, representing the Registrar  
of Motor Vehicle Dealers and Salesmen

DATE OF

HEARING: 18 June 1986

Toronto

REASONS FOR RULING

On June 12th, 1986, this Tribunal by its Decision and Order confirmed a Proposal of the Registrar of Motor Vehicle Dealers and Salesmen to revoke the registrations of Centennial Plymouth Chrysler (1973) Ltd., D. Brown Motors (Barrie) Limited and Gordon D. Coates. The decision of the Tribunal is now under appeal to the Divisional Court. Under section 7(9) of the Motor Vehicle Dealers Act, an Order of the Tribunal takes immediate effect notwithstanding that the decision is under appeal unless the Tribunal itself grants a stay of its Order.

The Tribunal has now had the opportunity to consider the submissions of counsel for the registrants and for the Registrar, and to review the decisions of the Court of Appeal and Divisional Court cited. In its own decisions, the Tribunal has been guided essentially by the factors set out in the Great Northern Capital Corporation decision. Therefore, in determining whether a stay should or should not be granted, the Tribunal takes the following matters into consideration:



- (1) Is the appeal to the Divisional Court bona fide?

There is no doubt in the Tribunal's mind that it is.

- (2) Are the grounds for appeal substantial?

The Notice of Appeal lists some five specific grounds. The merits of the appeal will, of course, be determined by the higher Court. This Tribunal is satisfied, however, that on the face of it, the grounds of appeal appear to have substance.

- (3) Finally, what is the hardship to the respective parties - the public on the one hand and the registrants on the other?

In the past, the Tribunal has held that unless the public was clearly at risk, that the benefit of an appeal procedure granted by the legislation should not, for all intents and purposes, be negated or frustrated by refusing to grant the stay. This approach is supported by the decision of Mr. Justice Callaghan in Van Brugge v. Arthur Frommer International Ltd. et al, 35 O.R. (2d), p.333 wherein he stated that, "The right to a stay is clear where refusal of stay would render the appeal nugatory".

In this case, the Tribunal must assume that the convictions registered against the Corporation and its own decision will act as a deterrent to further fraudulent activity on the part of the registrants.

Taking all these matters into account, the Tribunal concludes that a stay of its Order is appropriate. Therefore, by virtue of the authority vested in it under Section 7(9) of the Motor Vehicle Dealers Act, the Tribunal does grant a Stay of the its Order until disposition of the Appeal to the Divisional Court.

JOHNATHAN'S PLACE LIMITED  
(JOHNATHAN'S PLACE RESTAURANT)  
-and-  
512471 ONTARIO LIMITED  
(FIRENZE RISTORANTE ITALIANO)

HEARING TO CONSIDER APPLICATIONS  
FOR A STAY BY THE LICENSEES OF THE DECISIONS OF THE  
LIQUOR LICENCE BOARD FOR IMMEDIATE SUSPENSIONS

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
KENNETH VAN HAMME, MEMBER  
DENNIS J. EGAN, MEMBER

APPEARANCES:

JOSEPH MAGGISANO and BRIAN M. LECK,  
representing the Applicants

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF  
HEARING: 30 May 1986 Toronto

### REASONS FOR RULING

The Tribunal has now had the opportunity of reviewing the submissions of counsel for the Applicants and for the Board, as well as the three Decisions of this Tribunal wherein the issue of stay of an order were discussed. The Tribunal made it clear at the beginning of today's hearing that it would not deal with the merits of the two appeals filed, but would limit its deliberations to the issue of whether a stay of the Liquor Licence Board's Order should be granted under section 12(6) of the Liquor Licence Act.

Mr. Maggisano, counsel for the two Applicants, therefore, very briefly outlined the underlying reasons for the immediate suspension and revocation of the dining lounge licences for Johnathan's Place Restaurant and the Firenze restaurant.

As the Tribunal understands the circumstances, the Liquor Licence Board took the action it did essentially on the basis that misrepresentation and/or false information had been found in the liquor licence applications relating to both businesses and, therefore, the businesses had not been

carried on in accordance with law and with honesty and integrity. These are very serious allegations in the eyes of the Tribunal and the Tribunal will examine all of the evidence related to these issues in detail when the merits of the appeals are heard.

Mr. Grannum informed the Tribunal that, as far as was known, the businesses were operating in accordance with the Liquor Licence Act and that there were no other breaches of the Act other than those of misrepresentation and/or false information. There are no known health or safety hazards related to the operation of the two businesses and the public does not appear to be at risk in this regard.

Mr. Maggisano outlined the consequences of immediate suspension and revocation of the dining lounge licences, namely, the loss of employment of some 30 or 35 employees, and the financial losses which might be incurred by the creditors of the two businesses and Mr. Yakhni personally. Mr. Grannum replied to this by stating that the businesses were not being closed completely, but given the current liquor/food ratios, there is no question that the immediate revocation of the liquor licences would seriously affect these operations.

Nothing was said today which would lead the Tribunal to conclude that the appeal was not bona fide. While the Notice of Appeal did not disclose grounds of appeal, the Tribunal takes from the comments of Mr. Maggisano, that in part, mitigating circumstances will be pleaded. From the submissions made and if past conduct is considered, it does not appear that the public will be prejudiced by not immediately revoking the dining lounge licences.

In weighing these factors, the Tribunal concludes that a stay should be granted until the Tribunal makes its decision. To do otherwise might do irreparable harm to the operation of the two businesses, such that the benefit of the appeal procedure granted by the legislation, would for all intents and purposes be negated.

Accordingly the Tribunal by virtue of its authority under section 12(6) of the Liquor Licence Act will grant the stay until the Tribunal makes its decision.

FRANK LEUNG

APPEAL FROM A PROPOSAL OF  
THE REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
BARBARA NICHOLS, MEMBER  
JOHN W. PATERSON, MEMBER

APPEARANCES:

HUGH ROWAN, Q.C., representing the Applicant

STEPHEN A. AUSTIN, representing the Registrar under  
the Real Estate and Business Brokers Act

DATES OF

HEARING: 14, 15 May 1986

Toronto

REASONS FOR RULING

Counsel for the Registrar, Mr. Austin, called a witness, one Janina Kaminski. In his examination-in-chief, he attempted to establish the date upon which the listing for sale of property jointly owned by Mrs. Kaminski and her husband occurred and the circumstances surrounding it. In response to a number of questions, Mrs. Kaminski either said that she did not know or could not remember the particular details or circumstances about which she was being questioned. It was her evidence that she "guessed" the listing was initiated by her husband. She also said that when her husband had signed a document, she generally followed his lead as co-signer without reading it.

Counsel for the Registrar then referred the witness to a telephone conversation she had with an official of the Ministry of Consumer and Commercial Relations and asked several questions in relation to the identity of the official. While the witness recalled having the conversation, she could not identify the caller because she said she had not caught his name. This line of questioning was objected to by counsel for the Applicant.

The last two questions put to the witness were:

Q. Did a conversation take place between you and this gentleman regarding 507 Kingston Road?

A. I think it was, yes.

Q. You think it was?

Following this exchange, Mr. Austin asked that the witness be excluded from the hearing room and upon her withdrawal, he informed the Tribunal that it was his understanding that Mrs. Kaminski had had an extensive conversation with the Ministry official and that her memory was more explicit at that time. He then asked to have the witness declared hostile or adverse since it was his opinion that his witness was no longer reliable.

After some delay to permit both counsel to brief themselves on the issue, the Tribunal heard argument on this motion and reserved its decision.

Section 23 of the Evidence Act reads as follows:

23. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party, may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make such statement.

This section was considered in two leading cases - Wawanesa Mutual Insurance Co. v. Hanes, 1961, O.R. 495 and Boland v. The Globe and Mail, 1961, 29 D.L.R. (2d) 401.

The Tribunal has now had the opportunity of reviewing these decisions of the Ontario Court of Appeal. The Wawanesa decision was considered in the Boland case.

In the Boland case, Schroeder, J.A. reviewed this history of the now section 23 of the Act. At page 421 and following he states:

Over the years there has been a divergence of judicial opinion as to the precise meaning to be attached to the word "adverse" as used in the section of the Common Law Procedure Act, 1854, which is the English equivalent of s. 20 [now section 23] of the Ontario Evidence Act. Prior to that enactment a witness might be cross-examined by counsel for the party who called him if the trial Judge was of the opinion that the witness was hostile in the sense that he showed a mind hostile to the party calling him and by his manner of giving evidence betrayed a desire not to tell the truth, and he declared that in his opinion the witness was hostile. So far as the conduct or demeanour of the witness on the stand served to afford proof of such an animus, the common law required no statutory alteration to provide relief to a disappointed or discomfited litigant. Once the witness was ruled to be hostile, the party calling him could cross-examine him upon all relevant facts, including a statement made by him at some other time inconsistent with the testimony then given by him. The enactment covers in part rules of evidence theretofore recognized at common law and as to which there was no controversy. Its primary purpose was to remove any doubt as to the right of a litigant to prove under the conditions prescribed by the section, that the apostate witness called by him had made at some other time a statement inconsistent with his testimony at the trial. The prerequisite laid down by the Act is that the Judge must grant the



party leave to prove that fact which he might grant if, in his opinion, the witness "proved adverse". What, then, would constitute proof of the witness' adverseness? There is a substantial body of judicial opinion to support the view that "adverse" as used in the statute was intended to convey the same idea as the word "hostile" was understood to signify at common law. The fact that the legislators used a different word in the enactment in question is not, however, without deep significance. Etymologically the word "adverse" expresses the concept of a "turning against" or of "setting oneself against" another, and in that sense it denotes an oppositional attitude. A witness who gives testimony at variance with a statement made by him at some other time is not necessarily hostile to the party who called him. It is obvious that both accounts cannot be true and when a witness' own prior contrary statement is examined it may tend to prove a defect of intelligence or memory, partisan bias, weak faculties of observation, or want of moral honesty or regard for truth. The method of impeaching a witness' credit by establishing prior self-contradiction at least demonstrates that the witness is capable of error and tends to weaken his testimony to that extent. The evidence of that witness could be very detrimental to the side on which he appeared and the purpose of the statute was to afford relief to a party whose cause was hurt by a witness who might not have been hostile but whose evidence was nevertheless adverse to the cause of the party who called him. The legislators manifestly sought after and used a term to depict a disposition of mind of the defaulting witness, which would have less extreme connotations than the word "hostile". But whether "adverse" portrays a mental attitude as moderate as that implied by the word "unfavourable" at the lower end

of the scale or as inordinate as that indicated by the word "hostile" at the upper level or whether it denotes a condition of mind midway between these two extremes, the crucial question is whether the trial Judge, when addressing himself to the task of deciding the point at issue should consider as evidence relevant and material to the subject of inquiry implicit in the terms of the statute, the alleged inconsistent statement attributed to the witness.

It is utterly improbable that the witness' testimony would have been offered if it had been anticipated that his evidence would have taken an untoward turn, and adverseness in a witness generally presents itself to the party who called him as a highly astonishing and unexpected development. The fact that the witness who is alleged to have proven adverse made at some other time a statement at variance with his testimony then under consideration is in the highest degree material to the subsidiary issue thus raised and, indeed, I cannot think of any single fact or piece of evidence that would be more competent as an aid in its determination. Whether it should be held that a witness has or has not proven adverse must depend upon the circumstances of each particular case.

The learned Judge's failure to receive and consider this evidence before deciding whether to grant or withhold the leave sought by the plaintiff was error in relation to a matter of substance which is sufficient in itself to justify an appellate Court in reviewing the exercise of the trial Judge's discretion.

It is sufficient to say that the learned Judge ought to have heard and to have given due consideration to the alleged inconsistent testimony of Hladun before ruling upon the plaintiff's application

under s. 20. I find support for that proposition in the recent judgment of this Court, differently constituted, in *Wawanesa Mutual Ins. Co. v. Hanes*, 28 D.L.R. (2d) 386, [1961] O.R. 495.

From all the evidence heard from Mrs. Kaminski so far, the Tribunal cannot conclude that she is adverse to the Registrar. However, if the Tribunal's interpretation of the Boland decision is correct, Mr. Austin must be given the opportunity to present evidence of an alleged inconsistency in her testimony and the Tribunal must consider that evidence before ruling on his motion. The Tribunal therefore directs that Mrs. Kaminski be recalled so that such questions as are necessary may be put to her in this regard. The Tribunal will then rule on the motion.

FRANK LEUNG

APPEAL FROM A PROPOSAL OF  
THE REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
BARBARA NICHOLS, MEMBER  
JOHN W. PATERSON, MEMBER

APPEARANCES:

HUGH ROWAN, Q.C., representing the Applicant

STEPHEN A. AUSTIN, representing the Registrar under  
the Real Estate and Business Brokers Act

DATES OF

HEARING: 5, 6 June 1986

Toronto

REASONS FOR RULING

In the Reasons for Ruling released June 2, 1986, this Tribunal directed that Janina Kaminski, a witness called by counsel for the Registrar, be recalled for the purpose of examining her with reference to previous statements she had made to an official of the Ministry of Consumer and Commercial Relations. The examination was required in order to determine whether in fact statements inconsistent with those made before this Tribunal had been made to the official, and, if so, if there was an explanation for the discrepancies. After hearing this evidence, the Tribunal would be in a position to rule on Mr. Austin's motion to declare this witness adverse in interest.

Mrs. Kaminski did attend and the prior statements were put to her. The statements were put in evidence through Mr. MacKinnon, the Ministry official.

According to Mr. MacKinnon's evidence, the first conversation with Mrs. Kaminski began as follows:

our division does get involve (sic) in  
matters (sic) to the Real Estate Business  
Brokers Act and I'm working on such a  
matter right now. I'm looking at a  
multiple listing service agreement

dated July 2, 1985, it appears signed by Walter Kaminski and yourself and Steven Wong and someone else, I cannot make out the signature, who would that be?

The balance of the questions, in this very short conversation, essentially related to the identification of Frank Leung and Steve Wong; parties who were present when the agreement was signed; and whether Mr. Kaminski was at home at that time. The second conversation was an elaboration of the first, establishing when the agreement was signed and confirming the parties who were present. There was also a follow-up question on how long the Kaminski's had known Frank Leung or had used his services.

Although Mrs. Kaminski confirmed that she had spoken with someone from the Ministry, when questioned by Mr. Austin about her answers to Mr. MacKinnon, Mrs. Kaminski said she had been busy that day and that she could not recollect the exact statements she had made, and in some specific instances, particularly in relation to names, she denied what she is alleged to have said to Mr. MacKinnon. However, she finally agreed that the statements read to her from her conversation with Mr. MacKinnon were substantially correct in terms of what she actually said.

In considering the motion, the Tribunal has been guided by the decisions in Wawanesa Mutual Insurance Co. v. Hanes [1961] O.R. 495 and Boland v. The Globe and Mail Ltd, 1961 29 D.L.R. (2d) 401.

In the Wawanesa case, Porter C.J.O. at page 505 state

The word "adverse" is a more comprehensive expression than 'hostile.' It includes the concept of hostility of mind, but also includes what may be merely opposed in interest or unfavourable in the sense of opposite in position.

and at page 507, he said:

...the Judge should, to determine whether a witness is adverse, consider the testimony of the witness, and the statement, and satisfy himself upon any

relevant material presented to him that the witness made the statement. He should consider the relative importance of the statement, and whether it is substantially inconsistent. I think the Judge is entitled to consider all the surrounding circumstances that may assist him in forming his opinion as to whether the witness is adverse.

The Tribunal notes two matters. The first is that English is a second language for Mrs. Kaminski and while she is quite capable of understanding and responding to questions put to her in simple, everyday English, she seemed to have some difficulty in understanding and responding to questions which were long and/or used more technical terminology. The second matter to be noted is that the two conversations which she had with Mr. MacKinnon took place over the telephone. The first conversation was recorded by Mr. MacKinnon in longhand both during and after the conversation. These notes therefore were not a verbatim transcript of the whole conversation, but an edited version. The second conversation was taped and subsequently transcribed.

The difficulty the Tribunal has with these previous statements given to Mr. MacKinnon is that the Tribunal is not at all satisfied that Mrs. Kaminski knew exactly what agreement was being referred to by Mr. MacKinnon. Mrs. Kaminski, in an earlier appearance, has told the Tribunal that "if my husband sign something if it's on two names then I don't read it you know, whatever it says. I just sign." She did not have the July 2nd agreement with her when she was speaking with Mr. MacKinnon. Furthermore, there were in fact two multiple listing agreements purportedly signed by Mrs. Kaminski and her husband, one dated July 2, 1985, the other July 11, 1985.

In response to one of Mr. MacKinnon's questions in the second conversation, Mrs. Kaminski said in part:

We had a few deals so I don't remember if it was this one. If it was about the time we argued, but I think it was, because I think about the price or something else. I think it was night anyway.



On cross-examination by Mr. Rowan, Mrs. Kaminski stated that she thought Mr. MacKinnon was referring to the offer to purchase of 507 Kingston Road. Mrs. Kaminski was not sure what a 'multiple listing agreement' was.

The Tribunal has carefully compared the sworn testimony given by Mrs. Kaminski before this Tribunal and the statements she made to Mr. MacKinnon. There are some inconsistencies between the two, but given the circumstances of Mrs. Kaminski's conversations with Mr. MacKinnon, the Tribunal places little reliance or importance on her answers to him.

The demeanor of Mrs. Kaminski while before this Tribunal and her answers to both Counsel during examination-in-chief and cross-examination did not convey an impression of hostility of mind or opposition of interest or position to the Registrar. She appeared to be uncomfortable with the whole procedure and at times confused in her recollection of events that took place a year ago, but in the opinion of the Tribunal, she was not adverse in interest to the Registrar.

The motion brought by Mr. Austin to declare her adverse is therefore denied.

FLORENCE LOWES

APPEAL FROM THE DECISION OF THE  
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT  
TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
WATSON W. EVANS, MEMBER  
JOHN AUSTIN, MEMBER

APPEARANCES:

ONELIA DELGADO, representing the Applicant

MICHAEL D. LIPTON, Q.C., representing the  
Board of Trustees

DATE OF

HEARING: 26 May 1986

Toronto

REASONS FOR RULING

This application, brought by Florence Lowes, arises out of a series of events which began in early 1981. At that time Mrs. Lowes booked on a trip to China, Hong Kong, Japan and Taiwan with Lawson McKay Tours Limited. She paid \$1,235.00 as part payment for the trip. On or about April 8, 1981, Lawson McKay was placed into receivership and shortly thereafter Mrs. Lowes was advised that the trip would not proceed. At all material times Lawson McKay was registered under the Travel Industry Act as a "travel wholesaler" and was a participant in the Compensation Fund established under that Act and Regulations thereto.

Although Mrs. Lowes filed a chart containing the material details of her claim in September 1981, she did not file the formal Claim Form required by the legislation. Thus when this Tribunal heard some fifty claims arising out of the Lawson McKay receivership, it ruled that it had no jurisdiction to hear her claim because no claim had been made to the Board of Trustees.

In March 1982, the Tribunal released its decision respecting the fifty or so claims and ordered payment out of the Compensation Fund to those claimants only.

On December 15, 1982, O. Reg. 815/82 was filed thereby revoking and amending in part Regulation 938 to the Travel Industry Act. The pertinent amendments provided that a claim against the Compensation Fund must be made within six months of

the refusal or failure to pay by a participant, that the Board of Trustees may grant an extension of time for making a claim against the Fund and that the decision of the Board of Trustees as to any such extension "shall be final and not subject to review". The six month period, commenced December 15, 1982, expired June 15, 1983.

Meanwhile, the decision of this Tribunal on the Lawson McKay claims was appealed to the Divisional Court by the Board of Trustees. The decision of that Court dismissed the appeal on June 21, 1983.

On or about August 29, 1983, the Board of Trustees received a Consumer Claim Form on behalf of Mrs. Lowes. The claim was considered ineligible for payment from the Compensation Fund by the Board of Trustees because the deadline for filing the claim had expired. The deadline date given by the Board of Trustees was June 15, 1983. Mrs. Lowes was so advised by letter dated December 19, 1983. Implicit in the denial of the claim was the refusal by the Board of Trustees to extend further the time for filing.

By registered letter dated December 21, 1983, Mrs. Lowes requested a hearing before this Tribunal. A hearing was held on June 25, 1985 during which essentially procedural matters were discussed and on consent the matter was adjourned sine die on a date to be fixed by the Registrar of this Tribunal.

The matter came before the Tribunal on May 26, 1986. The Tribunal heard argument as to its jurisdiction to hear the applicant's claim, reserved its decision on this issue, agreed to take judicial notice of its March 1982 decision on the Lawson McKay claims and heard the testimony of Mrs. Lowes with reference to the amounts claimed by her from the Compensation Fund.

On behalf of Mrs. Lowes, it is submitted firstly that in compliance with Section 15(5) of the Schedule to the Regulation under the Travel Industry Act, there was an effective claim filed during the early autumn of 1981. The Tribunal rejects this submission. This matter was previously dealt with by it in March 1982 when the Tribunal released its ruling that "no claim having been made to the Board of Trustees....it [the Tribunal] has no jurisdiction pursuant to Schedule Section 16(3)."

Secondly, it is submitted that the Lowes' claim should be determined in light of the legislation as it existed at the time Mrs. Lowes' claim against the Compensation Fund arose

(i.e. in April, 1981), and not on the basis of the later changes to the Regulations, because these amendments were not specifically stated to be retroactive.

Counsel for the Board of Trustees disagrees with this submission. He argued that the amendments to Regulation 938 as enacted by O. Reg. 815/82 related to procedures only and did not take away any rights of the claimant, therefore the presumption against retrospective or retroactive construction had no application. It was submitted further that in fact the amendments were not applied retroactively because the Board of Trustees deemed that the limitation period would commence to run from the date of enactment of the amendments.

The Tribunal has carefully considered the arguments of both counsel and the authorities cited.

As the Tribunal interprets the amendments contained in O. Reg. 815/82, if a right to claim against the Fund arose more than six months before the amendments became effective, and if such right had not been exercised prior to the enactment, the effect of the amendments was to bar such claim absolutely unless the Board of Trustees extended the time for filing. In the present case, the Board of Trustees apparently extended the time for filing to June 15, 1983, which coincided with the six-month anniversary of enactment. Mrs. Lowes' claim was filed after that date.

The discretion or jurisdiction given to the Board of Trustees under what is now section 15(12) of the Schedule to extend the time for filing a claim is separate from the authority granted to it under paragraph 3 of Section 15(1) of the Schedule whereby the Board is empowered to determine the eligibility of the claim. The discretion under Section 15(12) is absolute and not subject to review.

This Tribunal cannot assume jurisdiction, nor by interpretation, extend its jurisdiction to cases not clearly and unmistakably provided for by some statute.

Mrs. Lowes' claim was subject to condition barred by legislation, and since this Tribunal has no authority or jurisdiction either to extend the time for filing the claim or to review the decision of the Board of Trustees on this matter, the Tribunal rules that there is no entitlement by the Applicant, Florence Lowes, to a hearing under Section 16(3) of the Schedule to Regulation 938, as amended, under the Travel Industry Act.

BURNS H. PROUDFOOT

APPEAL FROM THE PROPOSAL OF THE LIQUOR LICENCE BOARD  
OF ONTARIO

to amend the Terms and Conditions by extending the  
hours of service from 10:00 to 11:30 p.m.;  
to permit live entertainment in the form of  
unamplified instruments;  
the local community to be advised of any request for  
renewal of licence or request for transfer or  
licence.

RE:  
PICCOLO CASTELLO TRATTORIA LTD.  
(PICCOLO CASTELLO TRATTORIA RESTAURANT)

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING  
WATSON W. EVANS, MEMBER  
RONALD W. CHEMIJ MEMBER

APPEARANCES:  
B.H. PROUDFOOT, acting on his own behalf  
E.P. FIKSEL, representing the  
Piccolo Castello Trattoria Restaurant  
S.A. GRANNUM, representing the Liquor Licence Board

DATE OF  
HEARING: 9 June 1986

#### REASONS FOR RULING

The Liquor Licence Board held a hearing to determine whether terms and conditions previously attached to the Dining Lounge Licence of Piccolo Castello Trattoria Restaurant should be removed. Following the hearing, the Board released its decision dated April 17th, 1986, wherein it extended the hours of service from 10:00 p.m. to 11:30 p.m. and permitted live entertainment in the form of unamplified instruments. The Board also ordered that before the Dining Lounge Licence is renewed in 1988, notice of renewal would be sent to "all the objectors who appeared at this 'Hearing' and, in fact, who have been served with a 'Notice of Hearing', and that those persons be permitted to object to the renewal of the licence..."

A copy of this decision was sent to a number of individuals amongst whom was Mr. Burns Proudfoot. None of the named individuals was identified as representing an association or other person. By letter dated April 25th, 1986, Mr. Proudfoot served notice on this Tribunal that he wished to appeal the Liquor Licence Board's decision. A copy of his letter was sent to the Board.

Shortly thereafter, the Tribunal was advised by Mr. Grannum, counsel for the Board, that "It would be my opinion that Mr. Proudfoot in his individual capacity has no status to appeal the Board's decision." That letter was followed by a letter from Mr. Fiksel, counsel for the licence holder, which stated in part "...Mr. Proudfoot does not have standing with regard to this hearing."

Section 14(1) of the Liquor Licence Act reads as follows:

- (1) Any party to a proceeding before the Board under section 12 who is aggrieved by the decision of the Board may, within fifteen days after he is served with the decision of the Board, mail or deliver to the Board and the Tribunal a notice in writing requiring a hearing by the Tribunal.

Sections 12(3) and 12(5) of the Act state that:

- (3) Every person upon whom a notice is served and any other person added by the Board is a party to the proceedings.
- (5) The Board shall hold the hearing and give its decision and reasons therefor in writing to the parties to the proceedings.

There are two questions to be determined by this Tribunal:

- (1) Was Mr. Proudfoot a party to the proceedings before the Board under section 12 in his personal capacity, and
- (2) if so, was he aggrieved?



It appears that when the Board determined that a hearing under Section 12 of the Act was required, it sent several letters to those persons who had earlier objected to the issuance of the licence. The following letter dated March 4th, 1986 (Exhibit 7) was sent to Mr. Proudfoot in his personal capacity:

As you know, Ms. Pingitore has applied to the Board to remove the terms and conditions that the Board had attached to her licence.

There are objections to the removal of these terms and conditions and a Board hearing must be held pursuant to Section 11 of the Liquor Licence Act.

A hearing will be held in the near future and you and the objectors will be notified of the time, date and place of the hearing. At the hearing, you will be allowed to express the concerns outlined in your letter of the 11th of November.

Meanwhile, the terms and conditions will remain in effect.

This letter was followed by another dated March 13th 1986 (Exhibit 6) again addressed to Mr. Proudfoot in his personal capacity. It reads as follows:

This is to advise you that a 'Hearing' has been scheduled for the date Tuesday, April 8, 1986, at 1:00 p.m. to be held at these Offices, 55 Lake Shore Boulevard East, Toronto.

You are invited to attend this 'Hearing' so as to avail you of an opportunity to voice your objections to the removal of the existing term and condition which is attached to the 'Dining Lounge' Licence of this Licence Holder.

You may, of course, bring any other interested persons with you to the said proceedings.

Mr. Proudfoot attended at the hearing. He has stated before this Tribunal that he completed an attendance card for himself in his personal capacity and that he made representations and filed some documents during that hearing. He also stated that he did say that he was a member of the Nottawaga Creek Ratepayers Association but denies that he represented himself as President of that Association or that he made specific representations on behalf of the Association. He said his representations were made on his own behalf and on behalf of his mother who evidently owns the family property in that area.

In its decision, the Board had added as parties to the proceedings three Associations, one of which was the Nottawaga Creek Ratepayers Association. The decision outlines the submissions made to it, including those made by Mr. Proudfoot. It describes him as President of the Nottawaga Creek Ratepayers Association. The decision also listed the written objections it had received. Included in the list was the objection from Mr. Proudfoot again, evidently in his personal capacity.

Mr. Grannum directed the Tribunal to two earlier rulings issued by its predecessor the Liquor Licence Appeal Tribunal, both found in Volume 6 of the Summaries of Decisions of that Tribunal issued in 1982.

In the Brantford Harlequin Rugby Club decision, the Tribunal dealt with a situation similar to that before this Tribunal. A letter, as opposed to a formal notice of hearing, was sent to a Mrs. Kurmis and other complainants. The letter advised that a hearing had been scheduled for a particular date and time at the offices of the Board. It concluded with "You are invited to attend this 'hearing'. Please bring all interested parties with you." The Board hearing was held and attended by Mr. and Mrs. Kurmis, and a decision was rendered. The decision was appealed by the Kurmis'.

The Liquor Licence Appeal Tribunal held as follows:

The question is whether the letter of August 4th, 1981 (Exhibit 9) to Mr. F. Kurmis is a Notice of hearing within the meaning of the subsection. There is a clear distinction between the formal Notice of Hearing (Exhibit 3, Item 7) and the letter (Exhibit 9). The letter is a mere notification of the hearing to a person who is interested in the matter.

The Tribunal finds that the letter is not a notice of hearing within the meaning of section 12(3). It is a fact that no objector was added by the Board as a party to the proceedings. This power is able to be exercised by the Board before or after the hearing to be held. It was not exercised; indeed, there is no indication it was called upon to do so. Accordingly, the Tribunal finds that neither Mr. Kurmis nor any other objector is a party to a proceeding before the Board within the meaning of section 14.

The ruling in the Frank's Restaurant hearing dealt with the situation where initially a "formal" notice of hearing had not been served on a person who appeared before the Board, but the subsequent decision of the Board had been. The Liquor Licence Appeal Tribunal said:

The question is whether the letter of the 22nd of July, 1981 to Mr. Sharpe is a notice of hearing within the meaning of the subsection. The Tribunal has had an opportunity of commenting in this regard in an unreported decision (Brantford Harlequin Rugby Club issued on the 3rd of May, 1982). The Tribunal held that there was a clear distinction between the formal notice of hearing served upon on the Applicants and the letter which was served upon the person requesting the hearing. The letter was a mere notification of the hearing to a person who was interested in the matter. The Tribunal found that the letter is not a notice of hearing within the meaning of Section 12 (3). The Tribunal is relating its finding in that particular instance to that matter namely the issuance of a Special Occasion Permit. There is no direct evidence before the Tribunal whether or not the Board added Mr. Sharpe formally as a Party.

In this instance, reference can also be made to Subsection 5 where it is stated the Board "shall hold a hearing and give its decision and reasons therefor in writing to the parties to the proceedings". The Tribunal has before it the decision rendered by the Board and notes that a copy was sent to Mr. Sharpe, as it was to counsel for the Applicants. Accordingly the Tribunal finds that Mr. Sharpe was a party to the proceeding before the Board.

In addition to these two rulings, the Divisional Court in an unreported decision in Temple v. Liquor Licence Board et al, released in April 1983, examined the status of persons participating in a public meeting held pursuant to section 6 of the Liquor Licence Act. The decision of the Court related to a different set of circumstances, however, the following observation of the Court is noteworthy:

In a process where the public is given an opportunity to make representations, it is difficult to conclude that a person who attends the meeting and makes representations cannot be regarded as a party to that process.

Clearly, Mr. Proudfoot was a party to the proceedings. The letter advising him of the date and place of the Board's hearing was addressed to him personally; the decision was sent to him in his personal capacity; he attended the Board hearing and the Tribunal accepts his statement that he spoke on his own behalf. It may well be that, in part, he also spoke on behalf of others, but that of itself would not alter or change the capacity in which he appeared in the first instance. The Tribunal therefore finds that Mr. Proudfoot was a party to the proceedings before the Liquor Licence Board in his personal capacity.

The second issue is whether Mr. Proudfoot is aggrieved by the decision of the Board. The interpretation of the word "aggrieved" as used in the Liquor Licence Act has been previously considered by the Liquor Licence Appeal Tribunal. In the Frank's Restaurant ruling, the Tribunal states: "The

Tribunal is of the opinion that anyone whose concepts of needs and wishes have been decided against is aggrieved". The Tribunal finds that Mr. Proudfoot is aggrieved by the decision of the Board.

The Tribunal, therefore, has jurisdiction to hear the appeal brought by Mr. Proudfoot in his personal capacity.

Under Section 25(1) of the Statutory Powers Procedure Act, an appeal from a decision of a tribunal, in this case the Liquor Licence Board, to another appellate tribunal would operate as a stay of the matter unless this Tribunal otherwise orders.

Counsel for the licence holder has asked this Tribunal to exercise that authority. The Tribunal has considered the decision of the Liquor Licence Board and has weighed the possible negative impact of that decision, not only on the Applicant, Mr. Proudfoot, but on the public in the area, against the negative impact on the licence holder. Without in any way determining the merits of the appeal itself, the Tribunal is of the opinion that an order under section 25(1) is appropriate in the circumstances.

Therefore, by virtue of the general authority vested in it, the Tribunal finds that the Applicant, Burns Proudfoot, is entitled to require the Tribunal to hold a hearing pursuant to Section 14 of the Liquor Licence Act and that pursuant to Section 25(1) of the Statutory Powers Procedure Act, the appeal filed by the Applicant will not act as a stay of the Order of the Liquor Licence Board in this matter.















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